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FLEXIBILITY PROVISIONS IN STATE TITLE V OPERATING PERMIT PROGRAMS UNDER THE CLEAN AIR ACT

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I. INTRODUCTION

When the Clean Air Act (CAA)[1] was amended in 1990, the most ambitious feature of the new legislation was the Title V operating permit program.[2] It will take years to fully implement Title V.[3] So far, the most controversial aspect of the Title V program has proven to be the so-called flexibility provisions, which govern whether a Title V permit must be revised when an air pollution source wishes to make an operational change at its facility, and what procedures apply when a permit revision is necessary. As a general matter, Title V recognizes that an operating permit program must allow American industry sufficient flexibility to make changes quickly so that it can remain competitive in the global marketplace.[4] However, the Environmental Protection Agency (EPA)'s implementing "Part 70" regulations reflect a complex and uneasy reconciliation of the principle of flexibility with competing policies.[5]

This paper examines the experience of selected states and one "local" air pollution control agency in implementing the Part 70 flexibility provisions. Title V requires states and local agencies to develop individual Title V programs, submit them to EPA for approval, and

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[1] 42 U.S.C. §§ 7401-7671q (1988 & Supp. IV 1992).

[2] The operating permit program was enacted by Title V of the CAA Amendments of 1990, Pub. L. No. 101-549, 104. Stat. 2635. Title V is codified as Subchapter V of the CAA at 42 U.S.C. §§ 7661-7661f (CAA §§ 501-507). Technically, it might be more appropriate to refer to the Subchapter V program than the Title V program. However, Title V is by far the most common term, and this paper will employ that terminology. EPA's regulations use "title V" with a lowercase "t," but the capitalized Title V reference is more common, and easier to read.

[3] One commentator has only half-humorously remarked that by the time the Title V program begins to stabilize (sometime around the year 2005), given the history of the CAA, that may be just about the time Congress decides to rewrite the Act again. Kathy D. Bailey, *Questions Answered: Permitting Under the New Clean Air Act*, J. ENVTL. PERMITTING, Winter 1991/92, at 41, 48.

[4] CAA § 502(b)(10), 42 U.S.C. § 7661a(b)(10).

[5] "Part 70" refers to 40 C.F.R. Part 70 (1994). The Part 70 regulations were originally signed on June 25, 1992, and published in the Federal Register on July 21, 1992. *See* EPA's *Operating Permit Program; Final Rule*, 57 Fed. Reg. 32,250 (1992). Part 70 is also referred to in this paper at times as the "current rule." Again, EPA uses the lowercase "part 70" while this paper uses the more common capitalized version.

act as permitting authorities.[6] Most state and local agencies submitted their Title V programs to EPA on time or shortly thereafter.[7] This paper analyzes some of the more interesting Part 70 flexibility provisions of certain states, namely Texas, Wisconsin, Florida, and Pennsylvania, and one local agency, California's Ventura County Air Pollution Control District.[8] Before evaluating these specific Title V programs, however, the paper addresses two issues of common interest: the interpretation of what constitutes a Title I modification, and the relationship between Title V programs and preconstruction, or new source, review.

It was originally thought that state Title V programs would vary widely.[9] Most of the programs submitted to date, however, adhere fairly closely to Part 70.[10] This paper

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[6] State or local Title V programs are required by CAA § 502(d), 42 U.S.C. 7661a(d). A state is not the only governmental body that can act as a "permitting authority" under Title V. Local air pollution control agencies within a state can also be permitting authorities. For example, each of the 34 California Air Pollution Control Districts will administer its own Title V program. About 12 states have one or more local agencies that are also submitting programs.

[7] The statutory deadline was Nov. 15, 1993. By the end of Nov. 1993, 33 states and 26 local agencies had submitted their Title V programs to EPA. However, some of those programs, including ones from certain major states such as New York and New Jersey, were determined to be incomplete. As of June 29, 1994 (the most recent tabulation), submittals had been received from 41 state and 55 local agencies. Of those submittals, 32 state and 47 local programs were determined to be complete, and 9 state and 5 local programs were determined to be incomplete. EPA Office of Air Quality Planning and Standards, Clean Air Act Operating Permits Program Fact Sheet, June 29, 1994.

States which have not yet submitted their programs include all the Region I states (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont), Maryland, Tennessee, Kansas, and Missouri. Some states have not yet resubmitted after being found incomplete. These states are still in the process of rule adoption. For example, New Jersey has not yet adopted its final rules to implement Part 70. The proposed rules were issued on Aug. 20, 1993 as N. J. ADMIN. CODE 7:27-22 (Operating Permits). New Jersey plans to finalize part of the rules in Aug. 1994 and repropose many of the flexibility provisions at the same time. Telephone interview with Tom Micai, N.J. Dept. of Envtl. Protection and Energy, June 12, 1994.

[8] For convenience, this paper will hereinafter refer to state and local programs collectively as "state programs," unless otherwise indicated. This is a convention followed by Part 70.

[9] *See, e.g.*, David P. Novello, *The New Clean Air Act Operating Permit Program: EPA's Final Rules*, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10,080, 10,081 (Feb. 1993). Novello's article is the best overview of Title V and EPA's implementing regulations.

[10] A rough estimate is that 75% of the state programs closely track Part 70, 20% have some differing provisions of interest, and 5% vary drastically. Interview with Adan

concentrates on the relatively few programs that demonstrate unique approaches to the flexibility provisions. The Title V programs selected for analysis illustrate some of the complexities and subtleties involved in the Part 70 flexibility provisions. As will be seen, creative approaches can easily generate problems or confusion. Much will depend on how the states apply their flexibility provisions in practice.

Title V flexibility is still an evolving area of the law. Just as this paper was nearing completion, the EPA released proposed revisions to the Part 70 flexibility provisions.[11] Those revisions have not yet been published in the Federal Register, but the advance text of the proposal shows that significant changes to the current rule are planned.[12] The changes are the product of settlement negotiations concerning litigation over the current rule, and experience with state attempts to implement the current rule.[13] Despite the likelihood of changes based on the recent proposed revisions, this paper focuses on the flexibility provisions as they currently exist (i.e., under the July 21, 1992 Federal Register version of Part 70).

There is still great value in analyzing the flexibility provisions under the current rule. The experience of the states in attempting to implement the current rule may be instructive for the proposal to revise the Part 70 flexibility provisions. In addition, there will be a window during which the current rule will still control state programs, and even actual permits.

The length of the window will depend in part on when the recent proposal to revise

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Schwartz, EPA Office of General Counsel for Air and Radiation, Wash., D.C., May 20, 1994.

[11] EPA, 40 C.F.R. Part 70 Proposed Rule Revisions, 59 Fed. Reg. ____ (forthcoming Aug. 1994). The proposal was released on July 8, 1994. Gary Lee, *EPA Acts to Void Bush Concession to Industry on Clean Air*, WASH. POST, July 9, 1994, at A11; *Air Pollution: EPA Calls for Public Notice, Comments on Minor Permit Changes*, Daily Env't Rep. (BNA), July 12, 1994.

[12] Advance Text of EPA's 40 C.F.R. Part 70 Proposed Rule Revisions, July 8, 1994 [hereinafter Advance Text][Actual rule sections will hereinafter be cited as Proposed Amended 40 C.F.R. § 70.___].

[13] Advance Text, *supra* note 12, at 4 (preamble, sec. I).

Part 70 is finalized. This alone may take some time. The current Part 70 was not finalized for over a year after it was originally proposed.[14] In the meantime, EPA will be using the current rule to evaluate all state Title V programs that have already been submitted or that will be submitted before Part 70 is revised.[15] Therefore, most state Title V programs will come into effect under the current rule. Even after Part 70 is revised, there will be a phase-in period of 18 months for states to adopt new rules to incorporate the revisions.[16] Then, revised state programs will need to be resubmitted to EPA for review and approval. Thus, even if the proposal to revise Part 70 is finalized by January 1, 1995, many states will still be operating under the current rule until at least June 1, 1996, and possibly even later. Since the first Title V permits[17] may be issued as early as 1995,[18] there will probably be permits in existence that are controlled by the current rule, possibly even for a year or two.

Although this paper focuses on the current Part 70, it does discuss the proposed

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[14] The original proposal, found at 56 Fed. Reg. 21,712, was published on May 10, 1991. The final rule was not signed until June 25, 1992. The main reason for the delay was disputes within the administration, including Vice-President Quayle's Council on Competitiveness, particularly over the minor permit modification procedures. Novello, *supra* note 9, at 10,081. There may very well be further intra-Administration controversy over various aspects of the proposed revisions that will also delay their promulgation.

[15] More precisely, EPA is proposing that state and local program approvals be governed by the version of Part 70 in effect at the time of a program's submittal, except that programs submitted within six months after the publication date of the Part 70 revisions will be judged by whichever version of Part 70 the permitting authority chooses. Programs submitted after the six-month period would be evaluated under the revised Part 70. Advance Text, *supra* note 12, at 3 (preamble, sec. I) and 170-72 (preamble, sec. IV.C.3).

[16] States would have up to two years if legislative changes were necessary. Advance Text, *supra* note 12, at 171 (preamble, sec. IV.C.3); Proposed Amended 40 C.F.R. § 70.4(i).

[17] Another terminology convention used by this paper is "Title V permits." The Part 70 regulations and many states use the term "Part 70 permits," although "Title V permits" is often used interchangeably. Some state programs have their own terms, such as "federal operating permit" (Texas) or "operation permit" (Florida, Wisconsin).

[18] Initial Title V permits are to be issued to covered sources over a three-year phase-in period, one-third each year. When permit issuance begins will vary by state. State programs must first be approved by EPA. In many cases this will be done by Nov. 15, 1994. Sources are then given 12 months to apply for a permit after program approval, except that states may require earlier applications, and many are doing so. Although 18 months is allowed for permit issuance, those states that require earlier applications and can act more quickly may be able to issue some permits in 1995. *See* 40 C.F.R. §§ 70.4(e), 70.5(a)(1), 70.7(a)(2).

revisions in places, particularly in section III. It does this both to better illustrate how the current rule operates, and to show how and why the existing flexibility provisions are likely to change in the future. The preamble to the proposed revisions contains a wealth of information showing EPA's latest interpretation of the current rule. The proposed revisions are also discussed in the review of Pennsylvania's program, which is taking a different tack from other state programs, and actually has served as a model for some of the proposed revisions.

II. OVERVIEW OF THE TITLE V OPERATING PERMIT PROGRAM

This section provides the background to understand Title V as it relates to the requirements for state programs and the issue of flexibility in Title V permits.[19]

A. Pre-1990 Structure of the Clean Air Act

Title V is not the first air quality-related permit program. As discussed in more detail later in this paper, there are other air permit programs that predate Title V and will continue to exist apart from Title V (except where states choose to integrate them). The primary permit program aside from Title V is the CAA's "new source review" (NSR) program for the construction or modification of major sources in both nonattainment and attainment areas.[20] In addition, although the CAA did not require operating permit programs before Title V, virtually all states had them.[21] The problem was that the requirements and effectiveness of these state operating permit programs varied widely.

In general, the NSR and state operating permit programs before Title V were not the mainstay of air pollution regulation. For most of the CAA's history, the focal point has been section 110's requirement for State Implementation Plans (SIPs).[22] SIPs establish responsibilities for states and individual emission sources, and tie together most CAA

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[19] For more information about Title V in general, *see, e.g.*, 57 Fed. Reg. at 32,251-52; Novello, *supra* note 9; Timothy L. Williamson, *A Review of Major Provisions: Fitting Title V Into the Clean Air Act: Implementing the New Operating Permit Program* 21 ENVTL. L. 2085 (1991); Stephen E. Roady, *Permitting and Enforcement Under the Clean Air Act Amendments of 1990*, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,178 (Apr. 1991); JOHN-MARK STENSVAAG & CRAIG N. OREN, CLEAN AIR ACT: LAW AND PRACTICE, Ch. 14 (Supp. 1993): WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER, § 3.1 B (Supp. 1994).

For overview information about Part 70, *see generally* Novello, *supra* note 9; Leslie S. Ritts, *Questions- and Answers - About EPA's CAAA Final Operating Permit Rule*, J. ENVTL. PERMITTING, Winter 1992/93, at 21; Kim B. Poland, *Decisions, Decisions: EPA's Air Operating Permit Rules Offer Some Limited Options for State Program Elements*, J. ENVTL PERMITTING, Winter 1992/93, at 35.

[20] *See infra* text accompanying notes 243-61.

[21] *See infra* text accompanying notes 279-84.

[22] 42 U.S.C. § 7410.

provisions. Some of the requirements in a SIP have been specific emission limitations on large ("major") sources, some have been general restrictions on smaller ("area") sources, and some have consisted of broad regulation of motor vehicle usage.[23]

However, there are many problems with a SIP-based system of air pollution regulation.[24] The main problem is that it is too difficult for sources, and other parties such as regulators and citizens, to determine what the regulations actually require A SIP is not one convenient reference document where anyone can find the rules that apply to a particular source. SIP requirements are often scattered in various statutes and administrative codes. Even when they can be found, it is not always clear how they apply to a specific source. Although larger sources such as major corporations might have the resources to keep track of their applicable requirements, smaller sources and citizens usually do not. As a result, enforcement under the CAA has frequently been lacking.[25]

The amount of flexibility a source has to make an operational change or revise an emission limitation under a SIP depends on whether it follows the rules. In many cases, sources probably make changes that increase emissions without following the rules for revising the requirements that apply to them. This is usually due to the vagaries of a SIP-based system, which causes either a lack of awareness of the applicable requirements, or the belief that the enforcement risk is low. In such cases, sources can have a great deal of flexibility under a SIP-dominated system. However, if the rules are followed, the SIP revision

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[23] SIPs have not necessarily contained all the applicable requirements imposed on a source. For example, before the 1990 amendments, when air toxics were not effectively controlled by the CAA, some states had their own toxics programs that were not part of their SIP. General Accounting Office, *States Assigned a Major Role in EPA's Air Toxics Strategy*, GAO/RCED-87-76 (1987). In addition, EPA regulations such as New Source Performance Standards (NSPS) have established requirements apart from SIPs. See Williamson, *supra* note 19, at 2089. Nevertheless, the SIP was usually the instrument for imposing most requirements and limitations on emission sources.

[24] 57 Fed. Reg. at 32,251.

[25] Williamson, *supra* note 19, at 2091-94; STENSVAAG & OREN, *supra* note 19, at § 14.1.

process is cumbersome. The required process is called "the double key."[26] The double key means that a state and EPA must separately go through rulemaking to effectuate SIP changes, even for just one source.[27]

B. Adoption of a Federal Air Operating Permit System

During the 1980s, there was increasing recognition of deficiencies associated with reliance on SIPs for air pollution control.[28] Critics pointed to the relative success of the Clean Water Act (CWA),[29] which had relied on a permit system since 1972. The CWA's NPDES permits[30] regulated the discharge of an entire industrial plant's waste effluent through point sources. NPDES perm proved fairly effective in reducing point source pollution and were relatively easy to enforce. They not only established all the applicable requirements in one document, but they also required sources to monitor and report pollutant discharge levels, providing the raw data that could be used to determine and enforce violations.[31]

Because of the relative success of the CWA NPDES program, momentum developed to include a nationally uniform operating permit system in the CAA.[32] EPA advocated a permit system as part of the Administration's proposed 1990 CAA amendments. However, as originally submitted, proposed Title V was not the full-fledged package that was eventually

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[26] William Pedersen, *Why the Clean Air Act Works Badly*, 129 U. PA. L. REV. 1059, 1060 (1981). Pedersen, then EPA Deputy General Counsel, was the foremost critic of SIPs.

[27] Williamson, *supra* note 19, at 2097-98.

[28] COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, CLEAN AIR ACT AMENDMENTS OF 1989, S. REP. NO. 228, 101st Cong., 1st Sess. 348 (1989).

[29] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988 & Supp. IV 1994).

[30] National Pollutant Discharge Elimination System. CWA § 402, 33 U.S.C. § 1342.

[31] *See, e.g.*, Lisa M. Bromberg and Howard P. Davis, *Transferring 20 Years of NPDES Experience to the New Clean Air Act Permits*, J. ENVTL. PERMITTING, Summer 1993, at 351;

[32] Another factor was the existence of a permit system in the other major media environmental statute, the Resource Conservation and Recovery Act (RCRA). 57 Fed. Reg. at 32,251. Permits for the treatment, storage, or disposal of hazardous waste are required by RCRA § 3005, 42 U.S.C. § 6925.

passed. It started as a simpler provision aimed at raising fees for the regulation of air pollution by major sources in nonattainment areas. Ultimately, coverage was expanded to sources located in both nonattainment and attainment areas, and to major sources of hazardous air pollutants and acid rain precursors.[33]

Although some have criticized Congress for not giving enough attention to the implications of Title V,[34] others have shown that Title V issues - especially operational flexibility - were the subject of detailed debate and negotiations, and that industry and environmentalists were keenly aware of the likely consequences.[35] Industry was extremely concerned over the possibility of requiring a permit revision anytime a source makes an operational change, due to the anticipated adverse effect on economic competitiveness. Environmentalists worried that accommodating flexibility concerns would weaken Title V's effectiveness in strengthening compliance with applicable CAA requirements.[36] As a result of this conflict, there were a number of compromises related to the flexibility issues.[37]

C. Purpose and Design of Title V

1. Basic Concepts

Title V is considered a dramatic and radical departure from previous regulation under the CAA.[38] Title V is said to be modeled on the NPDES program However, this relationship is not very instructive in itself.[39] In contrast to NPDES permits, Title V permits are not

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[33] *See generally*, Michael Barr, How States Can Successfully Implement the New Operating Permit Title, NAT. RESOURCES & ENVT. (Fall 1992), at 7.

[34] Williamson, *supra* note 19, at 2086-87 and n.5.

[35] Roady, *supra* note 19, at 10,180-81.

[36] *Id.*

[37] Novello, *supra* note 9, at 10,090-91.

[38] *Id.*; STENSVAAG & OREN, *supra* note 19, at § 14.1.

[39] The relevance of the NPDES program to air permits has been criticized. Among other things, commentators point out that water and air are different media, and that it is much easier to regulate liquid waste streams which are usually consolidated within a single facility for discharge through a limited number of point sources than it is to account for and

intended to establish any new emission limitations for individual sources, or to create any other new substantive requirements.[40]

Rather, the purpose of Title V is to "improve the enforceability, and thus the effectiveness, of the [CAA]'s requirements by issuing to every covered source a permit that lists all of the requirements applicable to the source under the [CAA] and that includes monitoring provisions sufficient to determine compliance with those requirements."[41] Thus, the term "applicable requirements" becomes of paramount importance. Title V mandates that permit terms and conditions assure compliance with all "applicable requirements,"[42] but does not further define the term. Instead, Part 70 defines "applicable requirements" to include all categories of relevant air pollution control requirements, such as those standards or emissions limitations found in a SIP, any NSR construction permit, any New Source Performance Standard, any National Emission Standard for Hazardous Air Pollutants, etc.[43] While improving enforceability is considered the primary purpose of Title V, the salutary effect on compliance may be even more important.[44] As previously noted, many companies are unintentionally out of compliance with various CAA requirements simply because it is so

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control by permit the hundreds or even thousands of individual air emission points that can exist within a large industrial facility. *See, e.g.*, Williamson, *supra* note 19, at 2110-2112; James N. Christman & Lisa J. Sotto, *Monitoring and Reporting Issues Under Clean Air Act Permits: Lessons from the Water Permit Program*, J. ENVTL. PERMITTING, Summer 1993, at 363.

[40] 57 Fed. Reg. at 32,250; David A. Golden, *Preparing for the Federal Clean Air Act Operating Permit*, J. ENVTL. REG., Autumn 1993, at 1-2 (fact that Title V is not intended to create substantive requirements is overriding principle often overlooked; state permitting authorities should not be allowed to use Title V as a vehicle to impose additional substantive requirements).

[41] Advance Text, *supra* note 12, at 4 (preamble, sec. II.A). *See also* 57 Fed. Reg. at 32,250. "Congress' basic goal in adopting the title V permit program is to achieve improved air quality by establishing a "broad-based tool to aid effective implementation of the [CAA] and to enhance the Agency's ability to enforce the [CAA]." 56 Fed. Reg. at 21,714.

[42] CAA §§ 502(b)(5)(A), 504(a), 42 U.S.C. §§ 7661a(b)(5)(A), 7661c(a).

[43] 40 C.F.R. § 70.2.

[44] 56 Fed. Reg. at 21,713; Williamson, *supra* note 19, at 2088-89; Novello, *supra* note 9, at 10,081-82.

difficult to determine those requirements.[45] Undoubtedly, voluntary compliance will increase with Title V permits, obviating the need for enforcement in many cases.

To guide all aspects of Title V program development, EPA has cited a number of "implementation principles." These include ensuring environmental protection, minimizing redundancy in SIPs and permit programs, establishing certainty for permitted sources, and promoting simple and streamlined regulations. Another implementation principle is that Title V programs should allow flexibility in state programs and individual permits.[46]

In addition to understanding the purpose of Title V, the meaning of "applicable requirements," and the implementation principles behind program development, there are several other fundamental concepts that are highly relevant to any discussion of the flexibility provisions. One is that Title V establishes two broad categories of illegal acts. First, Title V makes it unlawful for any source that is required to have a Title V permit to operate without one. Second, it is unlawful for any person to violate any requirement of a Title V permit (i.e., to operate except in compliance with the permit).[47] Thus, Title V requires sources that must have a permit to obtain one and comply with it.

As is evident from these prohibitions, only certain sources are required to have a permit. The main category of sources subject to Title V is major stationary sources.[48] Again, the definition of major sources is found in the regulation.[49] Without going into all the details, suffice it to say that a major source is generally one that (1) has the potential to emit 100 tons per year or more of any air pollutant, or (2) qualifies as a major source under the 1990 CAA amendments' lowered thresholds for ozone, carbon monoxide, and particulate matter

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[45] Michael K. Glenn, *An Enforcement Program For the 1990s That Best Serves the Environment - Why Not Try "Amnesty"?*, J. ENVTL. PERMITTING, Summer 1993, at 429.

[46] 56 Fed. Reg. at 21,714-15.

[47] CAA § 502(a), 42 U.S.C. § 7661a(a).

[48] CAA § 502(a), 42 U.S.C. § 7661a(a); CAA § 501(2), 42 U.S.C. § 7661(2); 40 C.F.R. § 70.3(a)(1).

[49] 40 C.F.R. § 70.2.

nonattainment areas, or (3) is a major source for hazardous air pollutants.[50]

A final important concept, one that is particularly germane to the flexibility provisions, is federal enforceability. A Part 70 permit is to be divided into two parts. One part will contain the federally enforceable terms and conditions. The other part will contain the terms and conditions that are not federally enforceable. This second part is also known as the state-only portion of the permit.[51] The state-only portion of the permit contains any terms included in the permit which are not required under the CAA or under any of its applicable requirements. The state-only terms and conditions must be so designated by the state. Those terms so designated are not subject to the requirements of Part 70.[52] EPA discourages the excessive use of state-only terms.[53]

The effect of the division of a permit into federally enforceable and state-only terms and conditions is that Part 70 restrictions do not apply to operational changes which involve only state-only terms. If a source wants to make an operational change that will require a revision of a state-only permit term, the state may follow whatever procedures it chooses to make the revision.[54]

2. Title V Provisions Relating To Flexibility

There are actually only two provisions in Title V that are directly related to flexibility: section 502(b)(6) and section 502(b)(10). Section 502(b)(6) is generally considered the legal basis for the Part 70 provisions relating to permit flexibility, or the procedures to be followed

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[50] *Id.*

[51] 40 C.F.R. § 70.6(b).

[52] 40 C.F.R. § 70.6(b)(2).

[53] "The EPA does not believe that Congress intended title V to be a forum for the State to establish any additional requirements that would become federally enforceable. The primary purpose of the title V permitting program is to assure that subject sources comply with all requirements of the Act ... Additional State limits can clutter the title V permit with conditions that may confuse enforcement activities and limit the operational flexibility of the source. The permitting authority should segregate those permit conditions that are federally enforceable so that EPA oversight can be focused on the most critical concerns in the limited time afforded for EPA's 45 day review." 56 Fed. Reg. at 21,729.

[54] 57 Fed. Reg. at 32,268; Novello, *supra* note 9, at 10,092.

when a permit must be revised. Section 502(b)(10) is generally the authority for the operational flexibility provisions, which control what changes can be made without a permit revision. The word "generally" is used because in some cases different parties argue over the statutory authority for some of the flexibility provisions. The relevant Title V provisions are quoted below for ease of reference throughout the remainder of the paper.

Section 502(b)(6) requires that EPA's regulations establishing the minimum elements of a permit program include:

> Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.[55] (emphasis added).

As can be seen, section 502(b)(6) deals with many different aspects of permit processing, not just permit revisions. As it relates to permit revisions, it is a broad mandate for expeditious and streamlined review, but the procedures must also be adequate and reasonable. The language leaves plenty of room for debate over what procedures meet these criteria.

Section 502(b)(10) requires that the minimum elements of a permit program also include:

> Provisions to allow changes within a permitted facility (or one operating pursuant to section 7661b(d) of this title) without requiring a permit revision, if the changes are not modifications under any provision of subchapter I of this chapter and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions): *Provided*, That the facility provides the Administrator and the permitting authority with written notification in advance of the proposed changes which shall be a minimum of 7 days, unless the permitting authority provides in its regulations a different timeframe for emergencies.[56]

The basic concepts explicit in section 502(b)(10) are that: (1) a facility can make changes

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[55] 42 U.S.C. § 7661a(b)(6).

[56] 42 U.S.C. § 7661a(b)(10). Note that a facility that is "operating pursuant to section 7661b(d) of this title" is one that has timely applied for a title V permit but has not received it and thus qualifies for the application shield (which enables it to operate while the application is pending).

without a permit revision, if (2) the changes are not Title I modifications and do not exceed the emissions allowable under the permit, and (3) the facility provides 7 days notice to EPA and the permitting authority before making the changes. While the meaning of this section may seem clear enough at first glance, it has been subject to much dispute, and even EPA's interpretations changed greatly between the May 1991 proposal and the July 1992 final Part 70 rule.[57]

3. State and EPA Roles

Title V is designed to be implemented by the states, with EPA retaining substantial control. Each state is required to develop and submit Title V permit programs, and upon program approval by EPA, to act as the permitting authority.[58] EPA's control comes not only from its initial authority to approve state programs, but also from the ongoing requirement for each state to submit a copy of each individual permit to EPA, and EPA's power to then veto any permit that will not be in compliance with the applicable requirements.[59]

Generally, EPA is allowed 45 days after receiving a proposed Title V permit to object. If EPA does object, the permitting authority may not issue the permit until it is revised in accordance with EPA's objection.[60] Despite this veto power, EPA has indicated that it will not attempt to micro-manage Title V permits, but will be more concerned with program oversight.[61] Certainly, the EPA regions do not have the administrative or technical capacity to review every permit.

Title V broadly specifies the minimum elements of the permit program to be administered by each state.[62] The elements which pertain to the flexibility provisions, CAA

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[57] *See generally*, Novello, *supra* note 9, at 10,090-91.

[58] CAA §§ 502(d); 501(4), 42 U.S.C. §§ 7661a(d), 7661(4). *See also supra* note 6, where the term "permitting authority" is discussed.

[59] CAA § 505(a), (b), 42 U.S.C.§ 7661d(a), (b).

[60] *See* 40 C.F.R. § 70.8, Permit Review by EPA and Affected States.

[61] 56 Fed. Reg. at 21,715.

[62] CAA § 502(b), 42 U.S.C. § 7661a(b).

sections 502(b)(6) and 502(b)(10) have already been set forth. The details of the minimum elements required by the statute were expressly left to EPA implementing regulations, which were to be promulgated within one year of enactment of the 1990 CAVA, or by November 15, 1991.

4. Development and Approval of State Programs

Title V required state programs to be submitted to EPA for approval no later than 3 years after enactment of the 1990 CAA, or by November 15, 1993.[63] This would have given states two years to prepare their programs after the promulgation of the implementing regulations. But despite publishing the Part 70 proposal in May 1991, EPA was not able to promulgate the final rule until June 1992. The delay in promulgation of Part 70, however, did not affect the statutory deadline for the submission of individual state programs.[64]

The General Accounting Office studied the delay involved in issuing the Part 70 regulations and concluded that it had hampered the states in implementing the Title V program.[65] The GAO reported that some states were adversely affected because they waited for the final rule to be issued before developing their program plans. Fortunately, however, many states had been working since the 1990 CAA amendments to prepare for the implementation of Title V. The general outlines of what was required were apparent, especially after EPA's May 1991 proposal. EPA regions collaborated with states to identify legislative and regulatory changes necessary to implement Title V and the anticipated requirements of Part 70.

Once Part 70 was issued, this process accelerated. Between August and December 1992, EPA region and headquarters staff conducted workshops with state air agency

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[63] CAA § 502(d), 42 U.S.C. § 7661a(d).

[64] In the May 1991 proposal, EPA advised states that the Nov. 15, 1993 deadline "is a fixed date and does not depend on the date EPA promulgates the regulations in this proposal." 56 Fed. Reg. at 21,727.

[65] General Accounting Office, *Air Pollution: Difficulties in Implementing a National Air Permit Program*, GAO/RCED-93-59 (Feb. 1993).

personnel on the Part 70 requirements.[66] States and organizations exchanged information about suggested approaches to development of state regulations.[67] In addition, several EPA memos and checklists were widely circulated as guidance for the development of state programs.[68] EPA also created a model Attorney General's opinion covering the program elements that states were required to address.[69] It was distributed to all Attorneys General[70] and has been followed by many states. This coordination process and national exchange of information is one reason state programs have adhered more closely to Part 70 than was originally expected.

In developing their programs, the first task of the states was to determine what changes were needed in their legislation. Aware that many states would have difficulty in obtaining legislation to support state Part 70 regulations, EPA cautioned that the details did not have to be in the statutes.[71] Broad grants of authority to state air pollution control agencies are usually considered sufficient to support rulemaking on the details. Only such matters as civil and criminal enforcement penalties, judicial review, and public participation processes had to be specifically dealt with by legislation.

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[66] *Id.* at 18. EPA sponsored three conferences during this period to explain the requirements of the final rule to state and local agencies. Two private organizations, with assistance from EPA, sponsored similar workshops during the same period.

[67] *See, e.g.*, State and Territorial Air Pollution Program Administrators (STAPPA) and Association of Local Air Pollution Control Officials (ALAPCO), *Operating Permits Under the Clean Air Act: State and Local Options* (1993)(also known as the STAPPA/ALAPCO Handbook); Clean Air Implementation Project, *State Permit Programs to Implement EPA Operating Permit Regulations under the Clean Air Act Amendments of 1990* (1992)(also known as the CAIP Manual)(industry advocates).

[68] *See, e.g.*, Memorandum from John S. Seitz, Director, EPA Office of Air Quality Planning and Standards, to Air Division Directors, EPA Regions I-X, *Developing Approvable State Enabling Legislation Required to Implement Title V* (Feb. 25, 1993).

[69] Memorandum from Lydia N. Wegman, Deputy Director, EPA Office of Air Quality Planning and Standards, to Office of Regional Counsel, EPA Regions I-X, *Title V Model Attorney General's Opinion Guidance Document* (June 1, 1993).

[70] Memorandum from Brian J. Zwit, Environment Counsel for the National Association of Attorneys General, to All Attorneys General, *Title V Model Attorney General's Opinion Guidance Document* (June 17, 1993).

[71] Memorandum from John Seitz, *supra* note 68, at 2.

The development of state regulations often involved a process of negotiations by state air agencies with industry and environmental groups, followed by formal notice and public comment procedure. For instance, Texas held several "roundtable" sessions with interested parties before entering rulemaking, going to great lengths to achieve a program acceptable to both industry and environmentalists.[72] As a result, many state rules are a product of delicate compromises, and states have a great deal at stake in obtaining approval from EPA.

After receiving a state program, EPA has one year to approve or disapprove it.[73] This means that for programs received by November 15, 1993, EPA must act no later than November 15, 1994. EPA action is to be through notice and comment rulemaking.[74] As of July 1, 1994, EPA had made only two proposals. In May 1994, New Mexico's program was the first one proposed for approval, although it was only proposed for interim approval.[75]

EPA has three main options in dealing with state programs: full approval, interim approval, or disapproval. Interim approval is authorized if a program "'substantially meets" Title V requirements but is not fully approvable.[76] If EPA determines that only interim approval is warranted, EPA must specify the changes that must be made before the program can receive full approval. Interim approval expires after two years and may not be renewed, so it may be an even better tool than disapproval to force states to make necessary changes. Granting interim approval would provide more leverage because states would automatically lose their desirable approval status if they did not revise their regulations within the two-year period.

The term "substantially meets" was not defined in the statute, but Part 70 specifies 11 core program elements that states must provide for their programs to substantially meet Title

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[72] Texas held four roundtables with the regulated community, environmental groups, and the general public during February-March 1993.

[73] CAA § 502(d)(1), 42 U.S.C. § 7661a(d)(1).

[74] *Id.*

[75] 59 Fed. Reg. 26,158 (May 19, 1994).

[76] CAA § 502(g), 42 U.S.C. § 7661a(g).

V requirements.[77] Of relevance to the flexibility provisions, a substantially equivalent state program must allow operational flexibility changes, provide streamlined procedures for revising permits, and ensure that alternate operating scenarios requested by the source are included in the permit.[78]

In determining whether a state program is substantially equivalent, an extremely important issue is the extent to which states may deviate from the operational flexibility provisions of the Title V program. Generally, states are expressly authorized by CAA section 506(a) to impose additional requirements beyond the minimum elements of Title V.[79] In the context of the flexibility provisions, however, this general rule is confusing. Does it allow states to impose more stringent requirements that would have the effect of reducing the amount of operational flexibility that sources would otherwise have under Title V and Part 70, or must the minimum amount of operational flexibility provided under the federal scheme be maintained? On this issue, CAA section 116,[80] which provides that states may enforce any requirement respecting air pollution control as long as it is no less stringent than federal requirements, is also frequently invoked.

EPA's position is that states cannot adopt rules that would provide less operational flexibility than required by CAA section 502(b)(10). Although section 506(a) allows a state to adopt additional permitting requirements, they may not be inconsistent with the CAA. Since the CAA contains a mandate for operational flexibility, states cannot restrict the minimum operational flexibility provided to sources.[81] If interim approval is used, EPA will require overly restrictive state operational flexibility provisions to be eliminated. It should be noted, however, that the rule against overly restrictive state operational flexibility provisions

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[77] 40 C.F.R. § 70.4(d).

[78] 40 C.F.R. § 70.4(d)(viii), (ix), (xi).

[79] 42 U.S.C. § 7661e(a): "Nothing in this subchapter shall prevent a State ... from establishing additional permitting requirements not inconsistent with this chapter."

[80] 42 U.S.C. § 7416, Retention of State Authority.

[81] Advance Text, *supra* note 12, at 23-24 (preamble, sec. III.C.1.).

does not prevent a state from extending the minimum seven-day advance notice period prescribed by CAA section 502(b)(10), to allow more time for permitting authority review. It also does not prevent a state from establishing additional procedural requirements for permit revisions, such as requiring public review for minor permit modifications.

Interim approval is discretionary with EPA and will be granted only where it is in the best interests of the Title V program.[82] The main principle that EPA will follow in deciding whether to grant interim approval is whether a state program can ensure the issuance of good permits. For example, EPA would be more likely to grant interim approval to a program that provides more flexibility to sources than authorized under Part 70 than to one that fails to require the incorporation of all applicable requirements.[83] This is because incorporation of applicable requirements is essential for creating permits that ensure compliance with emission limitations, and is more important than adequate flexibility provisions.

EPA is now in the process of deciding whether programs that have been submitted should receive full or interim approval, or in a very few cases, whether they should be disapproved. There is great outside pressure and institutional desire to approve state programs, even if only on an interim basis, to make the Title V program a success. Some state programs are clearly eligible only for interim approval, often due to one or more procedural technicalities[84] or an omission of one necessary aspect of a program element in the enabling legislation or regulations. In other cases, EPA review has revealed more serious problems preventing full approval. In the second action taken to date, EPA proposed

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[82] Memorandum from John S. Seitz, Director, EPA Office of Air Quality Planning and Standards, to Air Division Directors, EPA Regions I-X, *Interim Title V Program Approvals* (Aug. 2, 1993), at 1.

[83] *Id.* at attachment 1.

[84] For example, Oklahoma's regulations were promulgated as emergency rules. State of Oklahoma Executive Department Approval of Adopted Emergency Rules, Jan. 14, 1994. Though enforceable, their status makes them subject to change until the next legislative session. EPA believes interim approval is warranted until the regulations are codified.

Virginia's program for disapproval.[85]

Because operational changes and permit revisions are not as likely to be necessary early in a permit term, there is less reason to disapprove a state program due to deficiencies in the flexibility provisions. Programs with only flexibility problems are good candidates for interim approval. The program can at least be put into effect while the state works on fixing defects in its flexibility provisions.

5. Effect of the Permits Litigation

As often happens with EPA regulations, Part 70 was challenged in court as soon as it was issued. The Natural Resources Defense Council and other environmental groups, the Clean Air Implementation Project and other industry associations, and a number of states filed suit. These cases are consolidated as *Clean Air Implementation Project v. Environmental Protection Agency*[86] and are referred to as the permits litigation.

The permits litigation encompasses many Part 70 issues. Among the provisions being challenged are the definitions of applicable requirement and major source, as well as the flexibility provisions.[87] The parties are actively engaged in settlement negotiations, which have resulted in the recent EPA proposal for revision of the Part 70 flexibility provisions.[88]

However, the permits litigation and the new EPA proposal do not affect the existing statutory deadlines for submission of state programs and EPA review. Even though it is certain that key portions of Part 70 will be revised as a result of the litigation, states and EPA are proceeding to develop the Title V program under Part 70 as it currently exists.

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[85] 59 Fed. Reg. 31,183 (June 17, 1994). The reasons for proposing disapproval are that Virginia's program does not contain the necessary legal authority to afford judicial review to persons who have participated in the public comment process, and it also does not contain the necessary legal authority to prevent default issuance of a permit.

[86] D.C. Cir., No. 92-1303, filed Jul. 21, 1993 [hereafter *CAIP v. EPA*].

[87] *See CAIP v. EPA*, Respondent's Briefing Format Proposal, Aug. 20, 1993, at 5-7.

[88] *See supra* notes 12-13 and accompanying text; *see also EPA Outline for a Proposal to Revise the Flexibility Provisions of the Permit Rule Dated March 21, 1994*, Daily Env't Rep. (BNA) Apr. 5, 1994 [1994 DER 64 d60].

III. THE PART 70 FLEXIBILITY PROVISIONS

Although Congress consciously provided for flexibility in the Title V program via sections 502(b)(6) and 502(b)(10), it is Part 70 that creates the details of the Title V flexibility scheme. Part 70 establishes two basic aspects of the Title V program relating to flexibility for industrial sources of air pollution. The first is operational flexibility, which can be defined as the ability of a source to make a physical or operational change at its facility without having to revise its Title V permit. The second is permit revisions, which are designed, at least in part, to give a source the ability to revise its permit without undue delay or administrative burden. A permit revision is necessary whenever the operational flexibility provisions do not apply.

It can be very difficult to understand the structure of Part 70's flexibility provisions. One reason is the sheer complexity of the regulation.[89] Another reason is that the flexibility provisions are not located in one convenient place in the rule. A third reason is the lack of examples in the preamble to the rule to illustrate how the flexibility provisions would be applied.[90] This section attempts to explain the individual Part 70 permit flexibility provisions, to give the necessary background for the discussion of individual state provisions in section VI. It begins with a review of the competing policies at work.

A. Policy Considerations

It is important to fully understand the policy considerations that have been balanced in creating the flexibility provisions. Although economic competitiveness is clearly the driving force behind the goal of establishing flexibility, it is opposed by powerful competing policies. There are three main groups of interested parties motivated by different policies: industry,

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[89] In the recent proposal, EPA has indicated that it is concerned that the Part 70 flexibility provisions, under either the current rule or the proposed revisions, are too "intricate and complex." EPA has solicited comments on simpler alternatives. Advance Text, *supra* note 12, at 8 (preamble, sec. II.C.).

[90] The lack of examples is a good indication that the Part 70 flexibility provisions are fairly narrow. The assorted restrictions or "gatekeepers" in each flexibility provision make it difficult to think of valid examples.

environmentalists, and state air agencies. The concerns of each of these groups will be addressed in turn.

1. Economic Policies

American industry is extremely concerned that to compete in an international economy, it must be able to make process and production changes on short notice without the extensive public, EPA, and air agency review that is required for initial permit issuance.[91] Here it may be helpful to describe just what the complete Title V permit review process for initial permit issuance entails.[92] To issue a Title V permit, the following steps must be followed: (1) public notice, (2) a 30-day public comment period, (3) a public hearing if requested and germane, (4) a public record of the commenters and issues raised, (5) notice to and review by affected states (neighboring states), (6) notice to and review by EPA, with opportunity for veto, and (7) citizen petitions to EPA to request EPA objection to the permit.[93] It is usually the public notice, comment, and hearing steps that most concern industry, because of their potential to cause delay. The step involving EPA review and veto is also a concern.

Although industry eventually acquiesced in the Title V operating permit program, viewing it as a way to obtain more certainty regarding applicable air pollution requirements, it was only with the understanding that the permitting system would be sufficiently flexible that companies would not have to go through the full-fledged review process for every change at their facilities.[94] Industry argues that procedural delays in issuance of permit

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[91] *See, e.g., Comments of the Clean Air Implementation Project on EPA's Proposed Rule for the Establishment of the Title V Operating Permit Program Under the Clean Air Act Amendments of 1990*, July 9, 1991, EPA Air Docket A-90-33, No. IV-D-351 [hereinafter CAIP comments]. The CAIP is an organization of major industrial corporations such as Bethlehem Steel, Dow Chemical, DuPont, Exxon, General Electric, IBM, Monsanto, etc.

[92] The same process is also required for significant modifications of a permit and renewals.

[93] 40 C.F.R. §§ 70.7(h); 70.8.

[94] Michael K. Glenn, *Which States Will Win the Air Operating Permit "Flexibility" Sweepstakes?*, J. ENVTL. PERMITTING, Winter 1993-94, at 115, 117.

revisions and requiring revisions for minor operational changes will interfere with the natural economic activity of industrial facilities in responding to changing market conditions and demands.[95] Of course, other sources such as military installations, which can be subject to frequent mission changes, have similar concerns.

The need for flexibility is not the same among all businesses. Some industries or manufacturing processes are essentially stable, with little change in products, raw materials, or technology. However, others are more dynamic, with frequent changes that have an impact on air emissions.[96] In these industries, plant changes can be triggered by new or improved products to satisfy market or regulatory requirements, seasonal demands for various products, use of new technology, use of new equipment, and lower cost or better quality feedstocks. The kinds of plant changes needed to respond to market or regulatory demands can range from installing pipe to changing process chemicals, and from reconfiguring batch operations to installing new air pollution control technologies.[97]

EPA recognizes the need for flexibility in certain types of industrial operations, specifically citing automobile plant operations, pharmaceutical batch production of small quantities of chemicals to meet consumer demands for new or specialized products, and leasing of chemical and petroleum storage tanks at ports and pipeline terminals (because of the wide range of chemicals handled, often on short notice). EPA acknowledges that although types of chemical feedstocks and corresponding emissions can usually be predicted over the longer run, short-run market demands are often unpredictable and the manufacturer must be able to respond quickly.[98]

Industry predicted that without flexibility, many plants could require one or more permit revisions a week. One CAIP member expected that under the proposed rules it would

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[95] CAIP Manual, *supra* note 67, at 2.

[96] John Quarles & William H. Lewis, Jr., Morgan, Lewis & Bockius, *The NEW Clean Air Act: A Guide to the Clean Air Program as Amended in 1990*, 1990, at 75.

[97] CAIP Comments, *supra* note 91, at 30-31.

[98] 56 Fed. Reg. at 21,748.

have to revise its permit 200-400 times per year.[99] Following are some examples of situations where an industrial facility might need to make many changes:

> Example 1: Petroleum companies are required to make changes at their refineries to satisfy customer demands for gasoline, fuel oil and other petroleum products that increase and decrease on a seasonal basis. The increased demand for gasoline, in some cases, results in an increase in benzene, toluene and xylene emissions when these seasonal shifts occur. This is in part due to the need to comply with EPA and state RVP [Reid Vapor Pressure] requirements.
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> Example 2: A flexible packaging manufacturing facility must respond quickly to widely varying and unpredictable customer requirements in order to maintain its competitive advantage. Annually, one such facility uses about 1,000 different materials, has over 24,000 different color variations, and uses various combinations of up to 15 chemicals. These changes result in different emissions. Most customers demand a 3 to 4 week response time. One third of the product line changes from year to year.
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> Example 3: In manufacturing aluminum, plants are required to make changes on a routine basis to respond to unpredictable customer demands. For example, in coil coating operations at the plants, aluminum sheets or foil is taken through a coating operation which consists of surface preparation, followed by applying roll-on coatings and curing by baking. These operations release emissions from solvents, some of which are listed as hazardous pollutants under Section 112. Although standard coatings typically are used, customers often request specialized coatings which require changes in formulations and produce emissions from unpermitted solvents. Making these changes can be necessary on short notice -- in some cases, only a few days.[100]

As a result of concerns such as these, during the development of state Title V programs, industry encouraged states to choose maximum operational flexibility, where there was a choice.[101] There has been little dispute about the general principle that industry often needs to make short-notice changes to meet changing market conditions. EPA explicitly recognizes the need for flexibility.[102] The controversy has been over the specifics: the types of changes that will be allowed without permit revision, and the procedures that will be

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[99] CAIP Comments, *supra* note 91, at 32.

[100] *Id.* at 34-35.

[101] CAIP Manual, *supra* note 67, at 13-32.

[102] "Sources must also be provided flexibility within their permits. Specifically, they should be allowed to make certain types of changes without having to undergo full permit-modification procedures. This will be especially important to some industries so that their market competitiveness is not jeopardized." 56 Fed. Reg. at 21,714-15.

required for permit revisions.

2. Environmental Policies

The basic environmental policy is that regardless of the amount of flexibility allowed, a Title V permit should always ensure that the applicable requirements remain enforceable.[103] EPA has consistently emphasized this Title V purpose above all others. Two goals that dominate EPA's approach to Part 70 are: (1) ensuring that the permit contains all applicable requirements and (2) ensuring that changes do not violate applicable requirements. While EPA acknowledges that routine changes should not require permit revisions, it has carefully tailored the flexibility provisions so that applicable requirements remain intact. Obviously, ensuring that applicable requirements are not violated helps achieve the ultimate environmental goal of improving air quality.

A related environmental policy is that the public should have an opportunity to participate in permitting decisions.[104] Environmentalists consider public participation essential for several reasons. First, public involvement helps improve permitting decisions. Second, it helps ensure the integrity of the permitting process. Third, it lays a stronger foundation for citizen enforcement.[105] The extent to which public participation should be allowed when permits are revised is at the heart of the debate over the flexibility provisions.

3. State Air Agency Policies

Of course, state air agencies are charged with improving or protecting air quality, and thus they too are motivated by environmental policies. At the same time, considerations of administrative efficiency also heavily influence their decisions. State air agencies want a permit program that allows adequate permitting authority review of changes made by sources,

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[103] EPA Office of Air Quality Planning and Standards, *Response to Comments on the 40 CFR Part 70 Rulemaking*, June 1992, EPA Air Docket No. A-90-33, V-C-1, at 6-21 [hereinafter EPA *Response to Comments*].

[104] Advance Text, *supra* note 12, at 7 (preamble, sec. II.C).

[105] Citizens may petition EPA to object to a permit, 40 C.F.R. § 70.8(d). In addition, CAA § 502(b)(6) requires an opportunity for judicial review in state court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review under applicable law.

but does not require excessive review. They also want a program that achieves air quality benefits at a minimum of cost and disruption to their existing pollution control programs.[106]

Concerns over administrative efficiency are very real. The magnitude of the task of issuing permits and reviewing frequent changes could be overwhelming. For instance, Texas reports that a single source in the Houston area, the Dow plant in Freeport, has over 3,000 discrete air emission points. Further, Texas experimented with issuing an NSR permit to American Airlines under Title V procedures and found it took six engineers six months to do it, resulting in a 160 page permit.[107] Although the bulk of state air agency work will occur at permit issuance, frequent operational changes at such large sources also have the potential to be extremely burdensome, especially if permit revisions are required for minor changes.

Thus, industry is not the only party which supports flexibility. Flexibility is also important to regulators, as EPA has acknowledged. "Processing unnecessary permit modifications for routine changes takes time and provides little environmental benefit."[108] Efficiency and economy in making changes should also benefit environmentalists and the public. The information overload which could result from trivial permit revisions might obscure the important changes which citizen groups want to monitor.

On the other hand, adequate permitting authority review is an important policy. A major association of state air agency personnel has pointed out that it may be very difficult for state agencies to track compliance if sources are making large numbers of changes under the operational flexibility provisions.[109] The association has advised states to build protections into their programs to ensure adequate regulatory review. For example, states are encouraged to require more than the minimum seven-day advance notice for operational changes. Additionally, states are advised that they may not want to allow minor permit

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[106] Advance Text, *supra* note 12, at 7 (preamble, sec. II.C).

[107] *Texas Air Control Board Staff Comments, Proposed Rule: Operating Permit Program*, July 8, 1991, EPA Air Docket No. A-90-33.

[108] 56 Fed. Reg. at 21,748.

[109] STAPPA/ALAPCO Handbook, *supra* note 67, at 15.

modifications to get the special treatment Part 70 allows. They may wish to establish their own public review, comment and approval processes for minor permit modifications.[110] Also, states are encouraged to make as many requirements as possible federally enforceable.[111]

4. EPA's Policy Balancing

EPA has expressly stated the policies which it has balanced in developing Part 70:

> The EPA's final regulations governing permit revisions balance several, sometimes conflicting, goals of the permit program. First, as explained above, the procedures for revising a permit should provide appropriate opportunities for the permitted source, permitting authority, EPA, affected States, and, where appropriate, the public to determine that the permit faithfully applies the Act's requirements. Second, any revision process must be tailored so that the procedural burdens on the permitted facility and permitting authority are reasonable in relation to the significance and complexity of the change being proposed in the permit. Third, the process must provide permittees with a reasonable level of certainty and ability to plan for change at the facility. Finally, the regulations must be flexible so that States may adapt their existing programs to meet Part 70 requirements without unnecessarily displacing procedures that have operated before the advent of the Federal operating permit program.[112]

B. Listing of the Part 70 Flexibility Provisions

The flexibility provisions are scattered throughout Part 70. Therefore, it is useful to list them all together. There are many different ways to categorize the flexibility provisions.[113] This paper uses the following organization:[114]

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[110] *Id.* at 23-25.

[111] *Id.* at 30-31.

[112] 57 Fed. Reg. at 32,280.

[113] The term "operational flexibility" is used in a number of different ways. Some use it loosely to refer to all the flexibility provisions including permit revisions. Part 70 uses it chiefly to refer to changes authorized under 40 C.F.R. § 70.4(b)(12), which are those stemming from CAA section 502(b)(10). However, Part 70 also acknowledges that off-permit changes and alternative operating scenarios are other ways of providing operational flexibility. This paper uses the term to cover all operational changes which can be made without a permit revision.

[114] The operational flexibility portion of this list is adapted from Charles H. Knauss, Shannon S. Broome & Michael E. Ward, *The Clean Air Act Operating Permit Program - A Handbook for Counsel, Environmental Managers, & Plant Managers*, 1993 A.B.A. SEC. NAT. RESOURCES, ENERGY & ENVTL. L. This handbook advocates ways for state programs to enhance flexibility and ways for sources to ensure they obtain all the flexibility available in

1. Operational Flexibility
   a. Off-Permit Changes.....40 C.F.R. 70.4(b)(14) and (15)
   b. Alternative Operating Scenarios.....40 C.F.R. 70.6(a)(9)
   c. Section 502(b)(10) Changes.....40 C.F.R. 70.4(b)(12)(i)
   d. Emissions Trading.....40 C.F.R. 70.4(b)(12)(ii) and (iii)

2. Permit Revisions
   a. Administrative Permit Amendments.....40 C.F.R. 70.7(d)
   b. Minor Permit Modifications.....40 C.F.R. 70.7(e)(2)
   c. Significant Permit Modifications.....40 C.F.R. 70.7(e)(4)

C. Changes Not Subject to the Part 70 Flexibility Provisions

Before proceeding further, it is crucial to realize that not all operational changes at a permitted source are governed by the flexibility provisions. There are many changes at a facility that would have no bearing on any air permit, and thus do not implicate Title V or Part 70. The current Part 70 does not make this entirely clear, and so EPA has undertaken to clarify it in the recent proposed revisions. Generally, the only types of operational changes that are subject to the flexibility provisions are those which have the potential to affect regulated air pollutant emissions.[115]

The simple rationale for this distinction is that activities that do not have any bearing on regulated air pollutant emissions do not give rise to permit terms, and so changes in those activities cannot require a permit revision. Two examples of such activities are moving process equipment and conducting routine maintenance.[116]

In addition, EPA points out that changes which only insignificantly affect regulated air pollutant emissions are not covered by the flexibility provisions, either.[117] This is due to the effect of 40 C.F.R. section 70.5(c), which provides that a source does not need to include insignificant activities and emissions levels in its permit application, unless they are relevant to determine the source's applicable requirements or the permit fees it must pay. (However,

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their state.

[115] Advance Text, *supra* note 12, at 12 (preamble, sec. II.B).

[116] *Id.* at n.3.

[117] *Id.*

insignificant activities or emissions levels which are exempted because of their size or production rate must at least be listed in the permit application.) States must develop a list of insignificant activities and emissions levels that can be omitted from permit applications, and that list is to be submitted as part of each state Title V program.

D. Operational Flexibility

As the above section demonstrates, only those changes that have the potential to affect regulated air emissions must be considered under the Part 70 flexibility provisions. The operational flexibility provisions apply to those changes that have the potential to affect regulated air emissions, but do not require a source to revise its permit.[118] The first class of changes under this category are the off-permit changes, a murky area indeed.

1. Off-Permit Changes

a. Definition and Examples

The concept of off-permit changes is designed for the category of changes that could affect air emissions but would not have any relationship to the existing permit. Under Part 70, this category of changes can be made without any type of permit revision. However, off-permit changes may eventually need to be incorporated into the permit when it is renewed. Off-permit changes are controversial, and EPA is proposing several significant changes to clarify this area.

Off-permit changes without a permit revision are authorized by 40 C.F.R. § 70.4(b)(14), although that section does not use the term "off-permit." The term "off-permit" comes from the Part 70 preamble.[119] Although EPA declares in the preamble that it encourages off-permit changes,[120] they are not a mandatory element of state programs. States

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[118] *See generally* Nancy Cookson, *Operational Flexibility: How Flexible Is It?*, J. ENVTL. PERMITTING, Spring 1993, at 153; Michael K. Glenn, *Which States Will Win the Air Operating Permit "Flexibility" Sweepstakes?*, J. ENVTL. PERMITTING, Winter 1993-94, at 115.

[119] 57 Fed. Reg. at 32,269.

[120] *Id.* at 32,270.

have discretion to either allow off-permit changes or prohibit them from being made without a permit revision. In program submittals, states are supposed to specify whether they will allow or prohibit off-permit changes.[121]

Off-permit changes are defined as "changes that are not addressed or prohibited by the permit...."[122] (emphasis added). However, there is little guidance in Part 70 or its preamble on what might constitute a change not addressed or prohibited by the permit. The preamble contains only a limited cautionary note that activities "not addressed" by the permit means that off-permit changes cannot alter the source's obligation to fulfill the compliance provisions of its permit. This is because 40 C.F.R. section 70.6 requires that compliance provisions be "addressed" in each permit. Thus, off-permit changes cannot involve any changes to compliance certification, testing, monitoring, reporting, or recordkeeping requirements which are necessary to ensure compliance with permit terms.[123]

Beyond that, what is meant by the term "addressed" is not very clear. In its response to comments to the proposal, EPA had used the term "regulated or prohibited" in lieu of "addressed or prohibited."[124] The preamble to the final rule, however, does not explain why "regulated" was changed to "addressed" or whether there is any difference.

The following are some examples of changes that might qualify as off-permit changes. The word "might" is used because the parameters of this type of change are not entirely clear. These examples have been drawn from various sources; there are no examples in the Part 70 preamble of what constitutes an off-permit change. The reader should bear in mind that each of these examples would be subject to the restrictions on off-permit changes discussed in the next section.

The first example is the case where a source emits a new pollutant not covered by its

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[121] EPA Part 70 - Operating Permits Program Review Checklist, at Attachment G. However, state Attorney General opinions are not required to address off-permit changes.

[122] 40 C.F.R. § 70.4(b)(14); 57 Fed. Reg. at 32,269.

[123] 57 Fed. Reg. at 32,269-70; 40 C.F.R. § 70.6(c)(1).

[124] EPA *Response to Comments, supra* note 103, at 6-26.

permit.[125] For instance, if a source subject to a federal CAA emissions limitation for Pollutant A needs to change its operations to emit Pollutant B, which is subject to a different CAA emissions limitation, and the emissions of Pollutant B are not addressed or prohibited by the permit, the source can make the change as an off-permit change.[126] (Again, there are certain restrictions that will be discussed in more detail shortly. For instance, a source could not add new emissions of 100 tons of a new pollutant using the off-permit change provision because that would constitute a Title I modification. Off-permit changes cannot be used for Title I modifications.)

A second example is adding a new emissions unit at a facility.[127] This is the most common example that has been given by commentators, and is similar to the first example, because both involve emissions of new pollutants not regulated by the permit. Another example is where a source shifts emissions of a pollutant from a piece of equipment upon which its permit imposes an emissions limit for that substance to a piece of equipment without an emission limit on that substance.[128] A fourth example involves a new product, using an automobile manufacturing facility which paints cars as an illustration. If the facility obtains a permit imposing restrictions on painting emissions for model X, but a year later develops a new production line for model Y, it could paint cars and create emissions for the model Y line as an off-permit change.[129]

b. Legal Basis for Off-Permit Changes

Off-permit changes are not specifically authorized by any CAA section, and many commenters challenged the legality of the concept.[130] The starting point is CAA section

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[125] As opposed to increasing emissions of a pollutant that is covered. Novello, *supra* note 9, at 10,091.

[126] Knauss, Broome & Ward, *supra* note 114, at 79.

[127] Novello, *supra* note 9, at 10,091.

[128] Williamson, *supra* note 19, at 2111.

[129] Adan Schwartz, EPA Office of General Counsel for Air and Radiation, Remarks at Geo. Wash. Univ., Nov. 9, 1993.

[130] 57 Fed. Reg. at 32,266.

502(a), which prohibits any permit holder from violating any permit requirement *and* prohibits every source that requires a permit from operating "except in compliance with a permit issued by the permitting authority...."[131] (emphasis added).

The issue is whether the language "except in compliance with" means that a source is prohibited from operating a facility *except as specified in* the permit or that it is allowed to operate in any manner it chooses *unless constrained by* the permit.[132] In the May 1991 proposal, EPA made it clear that it intended to adopt the "unless constrained by" approach:

> The first, and perhaps most important, source of flexibility is the general principle...that emissions or other practices not specifically prohibited by a permit are allowed if otherwise legal under the SIP and applicable federal and state law...Air permits summarize existing restrictions; a permit change is *not* affirmatively required to authorize every change in practices which are otherwise legal under the SIP or federal law merely because an existing permit does not address the practice...Permits should be drafted with this principle in mind so they do not include unnecessary detail or restrictions which might unduly hamper industrial flexibility to change operations at a later date.[133]

In the final rule, EPA adopted its preferred approach, despite criticism and the fact that historically many state operating permit programs have prohibited sources from implementing any plant site change not covered by the permit or the source's application:[134]

> A number of State and local air pollution control agencies also strongly criticized EPA's view stated in the proposal that emissions or other practices not prohibited by a permit are allowed. They argued that this concept runs counter to the way State and local air permitting programs are run, and is far too open-ended....[135]

However, EPA concluded CAA section 502(a) was not intended to prohibit off-permit changes.[136] Consequently, although a source must perform in accordance with the express

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[131] *Id.*

[132] Glenn, *supra* note 45, at 431 (excellent discussion of this issue from perspective of a source).

[133] 56 Fed. Reg. at 21,746.

[134] David R. McAvoy, Eli Lilly Co., *Memorandum Re: Clean Air Act State Operating Permit Program Regulation, paper for* the ABA Section of Natural Resources, Energy, and Environmental Law Title V Permit Program, Wash., D.C., Jan. 18, 1994, at 25.

[135] 57 Fed. Reg. at 32,266.

[136] 57 Fed. Reg. at 32,269.

requirements of the permit, if it wishes to do something that is not subject to a permit requirement, it may do so.[137] In other words, the permit is a set of restrictions, but not necessarily the ultimate authorization for every plant operation or change.[138]

c. Restrictions on Off-Permit Changes

Although the examples given previously may generally portray valid off-permit changes, there are several restrictions that would limit how the examples were applied in practice. The most important restriction is that a change cannot be handled as an off-permit change if it would violate any applicable requirement.[139] A source will always be constrained by the applicable requirements, whether they are embodied in the permit or not. Thus, in the examples above, if the emissions generated by a new emissions unit or product line exceed a SIP limitation, the source must still comply with the SIP.

The other main restrictions are that an off-permit change cannot violate any existing permit term or condition,[140] and that an off-permit change cannot constitute a Title I modification.[141] The proscription against violating any permit term or condition obviously springs from the definition of an off-permit change as one which is not prohibited by the

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[137] "The nature of a permit is to allow anything that it does not expressly prohibit. That is, a source may not only do what its permit specifically allows, but also what the permit terms do not specifically prohibit." 56 Fed. Reg. at 21,718.

[138] "Unlike the Clean Water Act, which prohibits any unpermitted discharge into waters of the United States, there is no clear prohibition in the CAA against emitting anything into the air without a permit. Title V forbids any person "to operate [a source requiring a permit]...except in compliance with a permit...." [Section 502(a)]. Where a permit imposes a limit on emissions from a piece of equipment, any shift in operations must meet that limit. But where the source shifts emissions of a pollutant from a piece of equipment upon which its permit imposes an emissions limit for a substance to a piece of equipment without an emission limit on that substance, nothing in the CAA requires the permit to prohibit that emission. Admittedly, many such shifts may constitute "modifications," and therefore must be accounted for in a permit revision. But changes which are not modifications are allowed as long as the permit does not prohibit the emission." Williamson, *supra* note 19, at 2110-2111 [footnotes omitted].

[139] 40 C.F.R. § 70.4(b)(14)(i).

[140] *Id.*

[141] 40 C.F.R. § 70.4(b)(15). Also, an off-permit change cannot be subject to any of the acid rain requirements.

permit. The basis for not allowing off-permit changes which are Title I modifications is less clear.

The preamble explains that although there is no CAA provision that specifically deals with off-permit changes, legal and policy reasons warrant restricting off-permit changes when they involve Title I modifications. EPA believes that legally the structure of the CAA, specifically section 502(b)(10)'s exclusion of Title I modifications from the class of changes that can be made without a permit revision, suggests that Title I modifications should not take place entirely outside the permitting process. As a policy matter, EPA points out that Title I modifications are significant changes which always implicate federal standards, and thus should not be made outside the permitting process.[142]

As a result of the various restrictions on the use of off-permit changes, EPA contends that only relatively minor changes can be made using this provision. Off-permit changes are not a mechanism for making significant changes at a facility without review.[143]

d. Off-Permit Change Procedure

Although off-permit changes can be made without a permit revision, the source must still take some affirmative action. The source must provide contemporaneous written notice of the change to the permitting authority and EPA and keep a record of the changes. In the notice, the source must describe the off-permit change, provide the date of the change, and specify any change in emissions, types of pollutants emitted, and any applicable requirement that would apply as a result of the change.[144] In the record, the source must describe changes made at the source that result in emissions of a regulated air pollutant subject to an applicable requirement, but not otherwise regulated under the permit, and the emissions resulting from those changes. The record may simply consist of copies of contemporaneous notices sent to

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[142] 57 Fed. Reg. at 32,269.

[143] EPA *Response to Comments*, *supra* note 103, at 6-27.

[144] 40 C.F.R. § 70.4(b)(14)(ii). The notice provision contains an exception for changes that qualify as insignificant under 40 C.F.R. § 70.5(c). That section enables a state to have a list of insignificant activities and emission levels which need not be included in permit applications.

the permitting authority and EPA.[145]

Contemporaneous notice provides a record of activity at the facility without inhibiting the source's ability to make the change. Additionally, contemporaneous notice allows the permitting authority and EPA to confirm that the change is a legitimate off-permit change and to determine if any new applicable requirements have been triggered.[146]

e. State Prohibitions

Part 70 authorizes states to prohibit off-permit changes from being made without a permit revision. This must be differentiated from an outright prohibition on making off-permit changes; Part 70 does not allow a state to ban off-permit changes entirely. In addition, any prohibition on making off-permit changes without a permit revision is a matter of state law.[147] Because EPA's policy as expressed in the preamble is that off-permit changes are an important source of flexibility under Title V, Part 70 provides that any state off-permit prohibition will not be federally enforceable. "This means that if a State elects to prohibit off-permit operations, neither EPA nor citizens could enforce against the source for failure to have a Federal Title V permit covering the off-permit change."[148] Any enforcement would have to be under state law.[149]

f. Value of Off-Permit Changes

Ultimately, what is considered off-permit will depend on how narrowly or how broadly the permit itself is written. Despite the restrictions that prevent off-permit changes from being used for significant changes, some commentators have predicted they could be a

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[145] 40 C.F.R. § 70.4(b)(14)(iv); 57 Fed. Reg. at 32,269.

[146] 57 Fed. Reg. at 32,269; Advance Text, *supra* note 12, at 13 (preamble, sec. II.B.1).

[147] 40 C.F.R. § 70.4(b)(14); 57 Fed. Reg. at 32,270.

[148] 57 Fed. Reg. at 32,270.

[149] However, an off-permit change prohibition can be made federally enforceable in the limited situation where the SIP or other applicable requirement, such as a MACT standard, includes such a prohibition. 57 Fed. Reg. at 32,270; 40 C.F.R. § 70.4(b)(14).

very valuable form of permit flexibility.[150] However, the ability to make off-permit changes would not necessarily be an advantage for a source in all cases. If a source increases its emissions off-permit, it may create the need for a SIP revision. A SIP revision would put the source back where it was before the permit, but because of the rulemaking process involved, the SIP revision would be a worse alternative than a permit revision.[151] Thus, sources must be careful in exercising rights to make off-permit changes.

g. Proposed Revisions

The lack of clarity about what constitutes an off-permit change is evident from EPA's discussion of the subject in the recent proposal to revise Part 70.[152] As EPA points out, there are very different views concerning what would qualify as an off-permit change under the current rule:

> Some have argued that the off-permit provisions allow a source to change its operations in ways not contemplated by the permit and to no longer comply with permit terms that were developed in light of the source's pre-change operations, even if the permit terms on their face remain applicable. Others have argued for a much narrower interpretation, suggesting that as long as a permit term applies to a unit or operation at a source, no change that affects which requirements are applicable to that unit or operation can be made on an off-permit basis.[153]

EPA proposes to resolve the conflicts over the interpretation of 40 C.F.R. section 70.4(b)(14) by clarifying that a source can make an off-permit change without first revising its permit "if it can and does operate the change while continuing to comply with all of its applicable permit terms."[154] This clarification would reject any interpretation of the current rule that would allow a source to no longer comply with permit terms that remain applicable on their face but that the source believes to be out-dated because it changed its operations in a manner not

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[150] Novello, *supra* note 9, at 10,091.

[151] Schwartz, *supra* note 129.

[152] Advance Text, *supra* note 12, at 12-21 (preamble, sec. II.B).

[153] *Id.* at 14.

[154] *Id.* at 18.

contemplated in the permit.[155]

EPA has considered eliminating off-permit changes entirely. One reason it is proposing not to do so is that it believes this type of flexibility will be important for a source to meet new regulatory standards as well as changing market conditions. The example given is the coming promulgation of numerous maximum achievable control technology (MACT) standards for hazardous air pollutants under CAA section 112. EPA believes that in order for sources to comply with those standards when issued, they may need to make changes before their permits can be revised. "To the extent they can make those changes while still complying with their permits, EPA believes they should be allowed to do so."[156]

However, EPA is taking comment on whether off-permit changes should be eliminated, as well as whether they should be allowed when there are emissions increases. Additionally, EPA is proposing to require applications to revise a permit to reflect an off-permit change within six months after the operation of the change commences. It is thought that this approach will better serve the purpose of keeping Title V permits reasonably up-to-date.[157]

h. Relationship to Inherent Flexibility

The above discussion shows the complicated nature of the off-permit change provision. It remains to differentiate off-permit changes from "inherent flexibility," a concept derived from certain remarks in the Part 70 preamble,[158] where EPA points out (in the context of operational flexibility under section 502(b)(10)), that:

> Nothing in this section is meant to imply any limit on the inherent flexibility sources have under their permits. A permittee can always make changes, including physical and production changes, that are not constrained under the permit. For example, a facility could physically move equipment without providing notice or obtaining a permit modification if the move does not change or affect applicable requirements or federally-enforceable permit terms

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[155] *Id.*

[156] *Id.* at 20-21.

[157] *Id.*

[158] *See* Knauss, Broome & Ward, *supra* note 114, at 75.

> or conditions. Or a painting facility with a permit that limits the VOC content of its paints can switch paint colors freely as long as each color complies with the VOC limit in the permit.[159]

According to this passage, inherent flexibility refers to changes that are not constrained under the permit, However the "unless constrained by" interpretation is also the one that governs off-permit changes. Moreover, moving equipment is one of the examples of a change that is not subject to the Part 70 flexibility provisions at all.

Although one commentator has defined inherent flexibility as a common-sense category for those day-to-day changes in activities that are not related to air pollution, involve emissions that are below permit limitations, or do not affect applicable requirements,[160] that definition mixes three different concepts. Changes in activities that are not related to air pollution are really changes that do not come within the scope of Title V or Part 70. Changes that involve emissions below permit limitations or do not affect applicable requirements could qualify as off-permit changes if not restricted. Inherent flexibility changes, on the other hand, are changes within the scope of the permit.

EPA has recognized that the meaning of *inherent flexibility* also needs clarification. EPA is proposing to express this principle by providing that a change at a source does not require a change in the permit if the source can make the change (1) without violating any permit term, and (2) without rendering the source newly subject to an applicable requirement. EPA declares that such flexibility is inherent in the current Part 70 rule.[161] Of course, when inherent flexibility is the basis for a change, no action is required other than to make the change. In other words, the source does not have to provide notice to EPA or the permitting authority, or keep any sort of record.

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[159] 57 Fed. Reg. at 32,267.

[160] Knauss, Broome & Ward, *supra* note 114, at 75-76. The authors recommend that state programs should include an explicit statement that nothing in the state program or regulations imposes limitations on the source's ability to make changes consistent with the inherent flexibility in the permit.

[161] Advance Text, *supra* note 12, at 15 (preamble, sec. II.B.3).

2. Alternative Operating Scenarios

Alternative operating scenarios are one way to write flexibility into a permit. 40 C.F.R. section 70.6(a)(9) requires permits to include terms and conditions for reasonably anticipated operating scenarios, also referred to as alternative operating scenarios, if the source requests them. Thus, the source must be able to forecast the need for different ways of operating, determine what those methods of operation will be, and then request that the permit include them. The rule does not make it clear whether the permitting authority must include the alternative scenarios requested by the source, or whether it has discretion to reject certain scenarios. But the language "as approved by the permitting authority" and the fact that alternative scenarios must be reasonably anticipated would lead one to conclude that the permitting authority has such discretion.

The only procedure required is that the source must make a contemporaneous record of the scenario it is using in a log kept at the facility. The log is subject to inspection. There is no outside notice to the permitting authority or EPA. The only restrictions are that the terms and conditions of each scenario must meet *all applicable* requirements and Part 70 requirements.

There is some potential for confusion about the authority for alternative operating scenarios. In the preamble, EPA lists alternative scenarios as a required provision of permit content, and simply shows the reference as "[502(b)(6)]."[162] However, EPA points out that environmentalists and states argued that the only purpose of section 502(b)(10) was to allow sources to shift among different operating scenarios (with different emissions) if the scenarios were set forth in the permit.[163] EPA's response to comments on the proposed rule clarifies that it believes that alternative scenarios are required by section 502(b)(6)'s mandate for adequate, streamlined, and reasonable procedures for permit actions, rather than section

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[162] 57 Fed. Reg. at 32,255.

[163] 57 Fed. Reg. at 32,266.

502(b)(10).[164] An even more fundamental basis for alternative operating scenarios than the statute may simply be that they are a way of writing a flexible permit. EPA sees alternative scenarios as part of the process of designing a permit that is flexible enough that industry can make changes without having to revise the permit.[165]

What then is the difference between inherent flexibility and alternative scenarios? Alternative scenarios are requested by the source to be included in the permit as specific methods of operation. The source can switch between the various ways of doing business that it has specifically anticipated. On the other hand, inherent flexibility is not requested; it simply exists because the particular change does not bring the permit terms or conditions into play. Procedurally, when a source shifts between alternative operating scenarios it must keep a log of the changes. However, no action is required for a change based on inherent flexibility. An example may illustrate the difference. If the limit on VOC content for paint is the same for all paint colors, then the flexibility to change between colors is inherent in the permit. However, if different emissions limitations would apply to different colors, then the change in color should be an alternative operating scenario.[166]

One particular alternative scenario that has been suggested is one for how a source will operate in the event of an "upset," or failure of emission control equipment. If the emissions flow can be re-routed to another process that will enable compliance with an emission limitation, that may prevent exceeding the emission limitation, but it might constitute a permit violation if the re-routing is not an alternative scenario. Without the alternative scenario, the source might need to shut down the particular emissions unit.[167] Another possible use of alternative scenarios is to pre-authorize Title I modifications.[168] Otherwise,

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[164] EPA *Response to Comments*, *supra* note 103, at 6-26.

[165] 56 Fed. Reg. at 21,748.

[166] Knauss, Broome & Ward, *supra* note 114, at 77.

[167] Golden, *supra* note 40, at 14.

[168] EPA *Response to Comments*, *supra* note 103, at 7-23.

Title I modifications cannot be made without a permit revision. And in that case, they must be processed as significant permit modifications.

Alternative operating scenarios have not been very controversial. All sides seem to agree that sources which can anticipate different methods of operation should be able to include them in the permit. Virtually all state programs submitted thus far expressly provide for alternative scenarios.[169]

Predictions are that most sources will have only a few alternative scenarios, although the largest sources will be special cases.[170] One reason for a limited number of alternative scenarios may be the difficulty of anticipating them. Determining emission information from a currently operating facility is hard enough; alternative scenarios demand careful analysis to establish emission limitations and applicable requirements for operations that may take place in the future. Upper management must first identify the products it might produce and the potential production levels. Facility personnel will then have to identify the processes needed to implement upper management's plans and the alternative scenarios that have historically been used at the facility.[171] One way around having to anticipate operating scenarios would be to set emission limitations high enough that most operational changes would not be restricted. This is called worst-case permitting[172] and is a potentially excellent way to create inherent flexibility in a permit.

EPA's proposed revisions to Part 70 do not seriously affect the current rule on alternative scenarios. One proposal is to clarify the rule to make clear that the permitting authority is allowed to include in a source's permit the alternative scenarios that it (the permitting authority) identifies as likely. This is considered important to ensure that permits

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[169] Texas does not expressly provide for alternative scenarios, but claims that they are implicitly authorized. *See infra* text accompanying notes 379-81.

[170] EPA *Response to Comments*, *supra* note 103, at 6-25; Knauss, Broome & Ward, *supra* note 114, at 77.

[171] Golden, *supra* note 40, at 14.

[172] EPA *Response to Comments*, *supra* note 103, at 6-25; 56 Fed. Reg. at 21,749.

are comprehensive. The other proposed change is to allow use of the on-site log to record changes only when tampering with monitoring data is not possible. Otherwise, a source would have to mail copies of the log to the permitting authority on a weekly basis.[173]

3. Section 502(b)(10) Changes

Part 70 derives three types of operational flexibility changes from CAA section 502(b)(10) changes. Those changes are found in 40 C.F.R. section 70.4(b)(12)(i)-(iii). One of the types of changes is expressly called section 502(b)(10) changes. The other two types involve emissions trading and will be discussed in the next section. Although one might expect section 502(b)(10) changes to be a relatively broad category, based on its derivation from the only provision in Title V expressly dealing with operational flexibility, it is instead a relatively narrow provision.

Section 502(b)(10) changes are specifically defined in 40 C.F.R. section 70.2 as changes that contravene an express permit term. As with all the flexibility provisions, there are restrictions on this broad definition. In this case, two restrictions are drawn from the statute and two are imposed by EPA as part of the definition in the rule. The statute provides that a section 502(b)(10) change cannot be a Title I modification and cannot exceed the emissions allowable under the permit.

The most important restriction is the further condition in the Part 70 definition that section 502(b)(10) changes cannot violate applicable requirements. The effect of this prohibition is to confine section 502(b)(10) to the contravention of permit terms that are derived from Part 70 itself rather than the underlying applicable requirement. For example, the contravention of the terms of a SIP which have been incorporated into the permit terms would not be allowed because the SIP is an applicable requirement.[174]

Therefore, only those permit terms which consist of requirements imposed by Part 70 alone can be violated. But there is an additional restriction, which is that section 502(b)(10)

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[173] Advance Text, *supra* note 12, at 38 (preamble, sec. III.D.2).

[174] Novello, *supra* note 9, at 10,091.

changes cannot contravene those Part 70 permit terms that are considered crucial for determining emissions allowable under the permit and ensuring compliance, namely monitoring, recordkeeping, reporting or compliance certification requirements.[175]

The only example of a section 502(b)(10) change given in Part 70 is that of a permit term that specifies a particular brand of coating and a corresponding emission limit for that coating. A section 502(b)(10) change would allow the source to change the brand of coating if the new brand complies with the emission limit.[176] In this example, the change would not violate the applicable requirement which established the emission limit. It may even be said that the permit term which specified the brand of coating was unnecessary because it would have been sufficient to specify the general type of coating alone. Thus, section 502(b)(10) changes may best be viewed as those that allow sources to make changes to permit terms that were inappropriately included in the permit.[177]

The procedure for section 502(b)(10) changes is simple and is taken directly from the statute. The basic requirement is for the source to provide a minimum of seven days advance written notice to the permitting authority and EPA.[178] The length of time for the advance notice is the most common area of variation in the state programs. Some state air agencies want up to 30 days advance notice for these changes. As with off-permit changes, the rule does not say whether the permitting authority or EPA can disapprove the change. However, states that extend the advance notice period seem to want the ability to do just that.[179]

The sole example given above hardly makes it seem as though section 502(b)(10)

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[175] 40 C.F.R. § 70.2

[176] 57 Fed. Reg. at 32,267.

[177] Knauss, Broome & Ward, *supra* note 114, at 85-86.

[178] 40 C.F.R. § 70.4(b)(12). The only things added to the statutory requirement by Part 70 are a description of the contents required in the notice and that the source, permitting authority, and EPA shall attach each notice to their copy of the permit.

[179] One possible indication that Part 70 does not intend for permitting authorities to disapprove section 502(b)(10) changes is the preamble's comment that: "If it is later proven that the change does not qualify under this provision, the original terms of the permit remain fully enforceable." 57 Fed. Reg. at 32,267.

changes have any great usefulness. It also does not indicate that section 502(b)(10) changes would be much of a problem. However, in EPA's proposed revisions to Part 70, there is a more in-depth analysis and interpretation of the meaning of this category of changes that sheds light on how section 502(b)(10) changes could be applied under the current rule, and the damage they could do to the Title V program.

EPA's proposed revisions explain that EPA views section 502(b)(10) changes as merely providing an opportunity for a source to "clean up its permit by avoiding compliance with provisions that unnecessarily constrain its operations in ways unrelated to implementing the [CAA]'s requirements."[180] However, as states began developing Title V programs, EPA became concerned that the process for these changes allows sources to make unilateral determinations regarding whether permit terms are justified by applicable requirements, and to act on those determinations after only seven days notice. This would foreclose effective permitting authority or EPA review, and could create a permit with a series of section 502(b)(10) notices attached voiding various permit terms. This in turn could hamper enforcement.[181]

As a result, EPA is proposing to delete Part 70 section 502(b)(10) changes entirely. CAA section 502(b)(10) will then be implemented solely through the emissions trading operational flexibility provisions. Nevertheless, at present, all states are including in their Title V programs section 502(b)(10) changes based on the current rule.

4. Emissions Trading

EPA interprets CAA section 502(b)(10) primarily as a mandate to promote emissions trading within permitted facilities, as long as the trading plans are clearly enforceable according to established compliance terms.[182] A vital requirement is that emissions trading plans be quantifiable and enforceable. Emissions trading can be defined as the balancing of

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[180] Advance Text, *supra* note 12, at 26 (preamble, sec. III.C.2).

[181] *Id.*

[182] Advance Text, *supra* note 12, at 25 (preamble, sec. III.C.1).

emissions increases from certain points within a facility with decreases from other points so there is no overall net increase.[183] Emissions trading is often thought of in connection with the bubble concept, where the air pollution from all the emissions points within a facility is regulated as though it was coming from one outlet in the bubble.

EPA summarizes Part 70's approach to emissions trading as follows:

> Consistent with its view that Section 502(b)(10) gives it broad authority to provide for operational flexibility, EPA has structured the final rule to allow emissions trading in several ways.... Where the permit itself sets out terms and conditions to allow trading, the terms are based on procedures provided by a SIP [see Section 70.6(a)(10)]. Where trading is allowed without a permit revision, the trade is based on provisions in the SIP [see Section 70.4(b)(12)(ii)], the program authorizing the trade has already been approved by EPA [see Section 70.6(a)(8)], or the trade is within an emissions cap independent of any applicable requirement [see Section 70.4(b)(12)(iii)].[184] (brackets in original).

The two emissions trading provisions that are derived from CAA section 502(b)(10) fall under 40 C.F.R. section 70.4(b)(12); one of these is optional and one is mandatory. The optional provision is for trading where allowed by the SIP. This type of trading is unlikely to be used much in the near future since currently no SIPs are structured to allow such trading.[185] The mandatory provision is for emissions trading solely for the purpose of complying with a federally enforceable emissions cap that is established in the permit independent of otherwise applicable requirements. Both types of trading under 40 C.F.R. section 70.4(b)(12) must comply with the seven-day notice required by section 502(b)(10).

Some industry commenters argued that the word "allowable" in CAA section 502(b)(10) (changes cannot exceed the emissions *allowable* under the permit) authorizes sources to meet their permit emission limitations using an average of all emissions across the permitted facility, as long as they give seven days notice.[186] In contesting this position, environmental commenters claimed that any permit that expressed allowable emissions as an

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[183] Emissions Trading Policy Statement, 51 Fed. Reg. 43,184 (Dec. 4, 1986).

[184] EPA *Response to Comments*, *supra* note 103, at 6-29.

[185] 57 Fed. Reg. at 32,268.

[186] EPA *Response to Comments*, *supra* note 103, at 6-28.

undifferentiated sum of pollution that might be released from a collection of emission units at the plant would not be enforceable, and thus would not meet the requirement of CAA section 504(a) that each permit have enforceable emission limitations.[187]

EPA disagreed with industry's request to be allowed to average emissions across the facility if that would conflict with applicable requirements. EPA stated that:

> If a SIP emission limit applies to each emissions unit at a facility, a title V permit cannot authorize any one unit to violate that emission limit, even if the average emissions across the facility are equal to the emissions that are allowed at the facility under the SIP. For example, if the SIP limits emissions to 5 lbs/hr per line for both lines A and B, title V does not allow line A to operate [at] 6 lbs/hr, even if the excess emissions are offset by operating line B at 4 lbs/hr. As a policy matter, emissions averaging provisions are often complicated to implement and require careful review to ensure that the trading plan allows the same emissions as the otherwise applicable requirements. The EPA believes that a 7-day notice is not a reasonable amount of time to conduct such a review.[188]

Why then did EPA allow any emissions trading under section 502(b)(10)? The main reason is that it was the Administration's overall policy to encourage emission trading programs.[189] EPA asserts in the Part 70 preamble that one of the goals of the CAA is to encourage responsible emissions trading plans and to reduce the cost of meeting applicable requirements. This belief, and EPA's general proposition that section 502(b)(10) gives it broad authority to provide for operational flexibility, led EPA to design Part 70 to encourage emissions trading, but only consistent with the requirement for Title V permits to comply with the applicable requirements.[190]

The most important of the emissions trading provisions, trading to meet permitted emissions caps, is clearly limited by applicable requirements:

> A source may increase its emissions on any unit only as high as allowed by the applicable requirements for that emissions unit. In addition the source's total emissions must remain below any voluntary limit on its potential to emit.

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[187] *Id.* at 6-27-6-28.

[188] EPA *Response to Comments*, *supra* note 103, at 6-20; *see also* 57 Fed. Reg. at 32,267 (same quote, minus the example)..

[189] EPA *Response to Comments*, *supra* note 103, at 6-29.

[190] 57 Fed. Reg. at 32,267.

> Within those limits, the source could cap its potential to emit, while maintaining the flexibility to shift emissions on short notice.[191]

Under this provision, the permitting authority must issue a permit that contains a federally enforceable emissions cap, independent of any applicable requirement (and of course, at least as stringent), if the source requests it. An important qualifier is that the trade must be quantifiable and enforceable.[192] The permitting authority does not have to allow emissions trading involving emissions units where these criteria are not met.

An example of an emissions trade under a cap would be a source that requests a cap to stay below the 25 ton per year major source threshold for hazardous air pollutant emissions. The cap could be in terms of individual operating hour limitations on emission units at the facility, instead of emission limitations. The source could then make trades by exceeding the operating hours cap on one unit and reducing the operating hours for another as long as net emissions remain below the cap. This would allow the source to avoid the applicable requirement of having to install MACT.[193] Of course, the source would have to give the required seven-day advance notice to engage in any trading.

The Part 70 emissions trading provisions are exceedingly complex. They are likely to grow in importance as a result of EPA's proposed revisions. EPA is proposing to retain the emissions trading provisions, but with certain revisions to address concerns of industry and states. Those revisions are also complex; the reader is referred to the text of the proposed revisions for more details.[194]

E. Permit Revisions

This section summarizes the three ways of revising a permit under Part 70 when a source seeks to make a change that cannot be made without a permit revision. Two of the

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[191] EPA *Response to Comments*, *supra* note 103, at 6-29.

[192] 40 C.F.R. § 70.4(b)(12)(iii).

[193] Knauss, Broome & Ward, *supra* note 114, at 84.

[194] Advance Text, *supra* note 12, at 27-35 (preamble, sec. III.C.3-5).

three permit revisions are referred to as permit modifications: minor and significant permit modifications. The third type of permit revision is the administrative permit amendment.[195] In its proposed revisions, EPA will delete the term modification and refer only to permit revisions and administrative amendments.

The authority cited for all permit revisions is CAA section 502(b)(6), but that section does not prescribe any specific procedures.[196] Rather, the main purpose of section 502(b)(6), as interpreted by EPA, is to ensure that the procedures used to issue or revise permits should not result in undue delay.[197] The implementation of section 502(b)(6), including the details of permit revisions, is left to the discretion of EPA.[198]

Although significant permit modifications are discussed in this section, they do not really provide flexibility to sources. That is because the procedures for significant permit modifications are the same as for permit issuance. They are discussed here only because some states have tinkered with the procedures to allow some flexibility. Administrative permit amendments and minor permit modifications, on the other hand, do provide flexibility. They allow sources to make permit revisions related to operational needs immediately, without prior approval by regulators, and without public notice and comment.[199]

EPA describes the current rule as a three-track revision process that provides different levels of review depending on the nature of the change being made. Administrative permit amendments receive the least review, and are therefore limited to either trivial changes or those that have already undergone a preconstruction review permit process. Minor permit

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[195] 40 C.F.R. § 70.2 (definition of permit revision and permit modification); 40 C.F.R. § 70.7(e).

[196] Section 502(b)(6) requires "[a]dequate, streamlined, and reasonable procedures...for expeditious review of permit actions, including...revisions." *See supra* text accompanying note 55.

[197] 56 Fed. Reg. at 21,747.

[198] In the May 1991 proposal, EPA said that the statute left substantial discretion to the states, as permitting authorities, to devise appropriate procedures for expeditious revisions to permits. 56 Fed. Reg. at 21,747.

[199] Cookson, *supra* note 118, at 160.

modifications receive EPA and affected state review, but only after the underlying operational change has been made. There is no public review, and therefore minor permit modifications are limited to changes that are not Title I modifications, among other restrictions. All changes not eligible for administrative amendment or minor modification processing must be handled using significant permit modification procedures. Significant permit modifications must be approved before the change can be operated.[200]

The Part 70 permit revision process has been criticized on all fronts. States are concerned that sources are allowed to make changes without adequate permitting authority review or prior approval. Environmental groups complain that public review is necessary. Industry believes that the procedures are more burdensome than necessary.[201]

1. Administrative Permit Amendments

There are six types of changes which can be made as administrative permit amendments.[202] The first four are unrelated to air quality[203] and cover simple changes: correction of typographical errors, change in name, address, or phone number of responsible person identified in the permit or similar minor administrative changes, more frequent monitoring or reporting, and change in ownership.

The fifth type of change is wholly separate from the others. It enables a state to incorporate into a Title V permit the requirements from a state new source review (NSR) permit, provided certain conditions are met. Those conditions are that the state NSR program must be "enhanced" so that (1) its procedures are substantially equivalent to those that would be required under Part 70 for review as a permit modification, and (2) the NSR permit contains compliance requirements substantially equivalent to those required by Part 70.[204]

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[200] Advance Text, *supra* note 12, at 40 (preamble, sec. III.E.1).

[201] *Id.* at 41.

[202] 40 C.F.R. 70.7(d)(1)(i)-(vi).

[203] 56 Fed. Reg. at 21,720.

[204] 40 C.F.R. 70.7(d)(1)(v).

Thus, if the state NSR permit is for a change that would need to be processed as a significant permit modification under Part 70 (e.g., a Title I modification), the permit terms could be incorporated into the Title V permit via an administrative permit amendment, but only if the state NSR program handled the change using the same procedures as Part 70 requires for significant permit modifications (and the compliance requirements were similar). Of course, since Part 70 significant permit modification procedure is the same as the full review process for permit issuance, state programs are unlikely to meet this criterion.[205]

The primary purpose of allowing state NSR permit terms to be brought into Title V permits by administrative permit amendment is to allow the permitting authority to consolidate NSR and Title V permit revision procedures.[206] There is no reason to require a more stringent type of permit revision for a change which has already been processed through a procedure substantially equivalent to Part 70 procedures for minor or significant permit modifications.[207]

The last category of changes that can be processed as administrative permit amendments are "any other type of change which the Administrator has determined as part of the approved Part 70 program to be similar to [the four enumerated types of minor changes unrelated to air quality]."[208] As will be seen, a number of state programs seem to be misinterpreting this "similar" changes catch-all provision. What they do is to provide that administrative permit amendments can be used for changes that are similar to "the preceding categories" (referring to the four enumerated types of minor changes unrelated to air quality).

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[205] EPA recognized that most state preconstruction review programs do not meet Title V requirements. 57 Fed. Reg. at 32,289.

[206] *Id.*

[207] "Changes which have been processed under the preconstruction review process which has been approved by EPA into the SIP have already in a source-specific way been subjected to sufficient technical review and adequate opportunity for public participation... Moreover, subjecting sources to another review could subject vast numbers of sources to significant delay and uncertainty without any real environmental benefit." 56 Fed. Reg. at 21,747-48.

[208] 40 C.F.R. 70.7(d)(vi).

However, EPA's position is that the state must identify in advance those changes which it considers to be similar, specifically list them, and obtain EPA approval.[209] In other words, individual states may not have broad "similar" changes provisions.

Because administrative permit amendments do not involve emission changes (or in the case of NSR incorporation, have already met CAA requirements), EPA concluded that a simple procedure was justified. Part 70 does require the source to submit a request to the permitting authority. However, the source may implement the change immediately upon submittal of the request. The permitting authority is then allowed 60 days to take final action on the request. The 60 day period is a convenience to the permitting authority, not a waiting period for the source. After the permit is revised, the permitting authority provides EPA a copy. As long as the permit revision is designated as having been made as an administrative permit amendment, the permitting authority does not have to give notice to the public or affected states.[210]

Industry advocated that state programs not adopt any procedure more burdensome than required by Part 70, that the 60 day period be shortened to 30 days because most changes are clerical, and that states make legislative and regulatory changes to enhance their NSR programs.[211] The state programs selected for review generally do not adopt more burdensome procedures, but by the same token do not shorten the 60 day period.

2. Minor Permit Modifications

Most of the interest in permit revisions focuses on minor permit modifications. For example, EPA devotes eight pages of the Part 70 preamble to an explication and defense of the minor permit modification procedures.[212] The attention to minor permit modifications may be out of proportion to their importance. Because of the numerous restrictions EPA

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[209] 57 Fed. Reg. at 32,289.

[210] 40 C.F.R. § 70.7(d)(3).

[211] Knauss, Broome & Ward, *supra* note 114, at 92.

[212] 57 Fed. Reg. at 32,281-89.

imposes on minor permit modifications, they are not as useful to a source seeking flexibility as one might expect.[213]

The best way to illustrate minor permit modifications is to compare them to significant permit modifications. First, there are several fundamental procedural differences. The main difference is that public notice and comment is not required for minor permit modifications. In contrast, since significant permit modifications require the same full procedure as permit issuance, public review is required. The second difference is that with a minor permit modification, the source can make the change immediately upon submitting an application to the permitting authority.[214] With significant permit modifications, however, the change cannot be made until after the application is approved, which means after the full review process has taken place.[215]

The main similarity between the two procedures is that the same government agencies (permitting authority, affected states, and EPA) review both types of permit modifications. And, EPA has veto power over both types of changes.[216] However, with minor permit modifications, because the change can be made immediately upon submitting the application, governmental review takes place after the change, and an EPA veto would come after the fact.[217] On the other hand, with a significant permit modification, review precedes the change and EPA can veto the change before it is made.[218]

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[213] In its outline proposal to settle the permits litigation, EPA admitted that the current rule for minor permit modifications is "extremely narrow." *EPA Outline for a Proposal to Revise the Flexibility Provisions, supra* note 88, at section IV.

[214] 40 C.F.R. § 70.7(e)(2)(v). Between the application and permitting authority final action, the source must comply with both the applicable requirements governing the change and the proposed permit terms and conditions.

[215] 57 Fed. Reg. at 32,281.

[216] Compare administrative permit amendments, where EPA does not have a veto.

[217] In that case, the source would be subject to an enforcement action for violating the terms and conditions of the existing permit that it sought to modify. 40 C.F.R. § 70.7(e)(2)(v).

[218] 40 C.F.R. § 70.7(a) lists the following conditions that all permits, permit modifications, and renewals must meet: (1) the permitting authority has received a complete application, (2) except for minor permit modifications, the permitting authority has complied

The procedures for minor permit modifications will be discussed before the substantive criteria. The procedures for minor permit modifications are considered streamlined, in accordance with the mandate of CAA section 502(b)(6). The less rigorous procedures for minor permit modifications are an attempt to match the procedural elements to the significance of the change. Minor permit modifications are intended for "minor" or smaller changes at a facility that do not involve complicated regulatory determinations.[219] The primary legal issues involved in the disputes over minor permit modifications were procedural: whether public notice and comment (including a hearing) is necessary, and whether a source can make the change before the permit modification is approved.[220] EPA's extensive discussion of these issues in the preamble will not be repeated here.[221]

A summary of the Part 70 procedures for minor permit modifications can be divided into three topics: the application, EPA and affected state notification, and the timetable for issuance.[222] Like the contemporaneous notice required for off-permit changes, the application must include a description of the change, the emissions resulting from the change, and any new applicable requirements. In addition, the application must also be certified by a responsible official as meeting the minor permit modification criteria.[223] The permitting authority must then provide notice of the application to EPA and affected states within 5 working days of receipt of the application.

Understanding the timetable is a little tricky. Generally, a permitting authority cannot

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with the requirements for public participation under 40 C.F.R. § 70.7(h), (3) the permitting authority has complied with the requirements for notifying and responding to affected states under 40 C.F.R. § 70.8(b), (4) the conditions of the permit provide for compliance with all applicable requirements and the requirements of Part 70, and (5) EPA must receive a copy of the proposed permit and any required notices, and must not object (veto) within the specified time period.

[219] 57 Fed. Reg. at 32,280.

[220] Novello, *supra* note 9, at 10,091.

[221] *See* 57 Fed. Reg. at 32,281-87. This portion of the preamble is a detailed statutory and case law analysis and interpretation.

[222] 40 C.F.R. § 70.7(e)(2)(ii)-(iv).

[223] For additional application requirements, *see* 40 C.F.R. § 70.5(c).

take final action *before* the end of EPA's 45-day review period. An exception is that the permitting authority may take action before the end of the 45-day review period if EPA provides notice that it will not object. The permitting authority also cannot take final action any *later* than 90 days after receipt of the application, or 15 days after EPA's 45-day review period, whichever is later.

To complicate matters, the permitting authority is allowed to approve the minor permit modification before EPA review takes place. Of course, such approval must be withdrawn if EPA vetoes the modification. Final action consists of one of four possible events: issue the requested modification, deny it, determine that it should be processed as a significant permit modification, or revise the modification to satisfy EPA's objection and retransmit it to EPA.[224]

The substantive criteria for minor permit modifications are complicated. In order justify its characterization of this type of permit revision as being for minor changes only, EPA has been forced to layer on numerous restrictions.[225] These "gatekeepers" are extremely important, and hence are listed in full:

> Minor permit modification procedures may be used only for those permit modifications that:
>
> (1) Do not violate any applicable requirement;
>
> (2) Do not involve significant changes to existing monitoring, reporting, or recordkeeping requirements in the permit;
>
> (3) Do not require or change a case-by-case determination of an emission limitation or other standard, or a source-specific determination for temporary sources of ambient impacts, or a visibility or increment analysis;
>
> (4) Do not seek to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement and that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject. Such terms and conditions include:
>
> > (A) A federally enforceable emissions cap assumed to avoid classification as a modification under any provision of title I; and

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[224] 40 C.F.R. § 70.7(e)(2)(iv).

[225] 57 Fed. Reg. at 32,283.

(B) An alternative emissions limit approved pursuant to regulations promulgated under section 112(i)(5) of the Act;

(5) Are not modifications under any provision of title I of the Act; and

(6) Are not required by the State program to be processed as a significant modification.[226]

As will be seen, even seemingly minor or subtle changes or omissions in the language of these gatekeepers can have a dramatic effect on the scope of a state Title V program. The most important limitation in these criteria - that the change not be a modification under Title I - will be analyzed in section IV.

Because of the list of changes that cannot be processed as minor permit modifications, relatively few changes can actually be made under this category.[227] The prohibition against violating any applicable requirement means that no source can make a change using a minor permit modification which would violate MACT standards, NESHAP, RACT limits contained in a SIP, NSPS, BACT, LAER, work practice standards established pursuant to a SIP, or other federal requirements.[228] The following types of changes probably could be made: (1) changes to state-only permit terms, (2) insignificant changes to monitoring, recordkeeping, and reporting requirements, and (3) changes to comply with economic incentives, emissions trading, marketable permits, or other similar approaches if the underlying SIP or EPA rule provides explicitly for use of minor permit modification procedures to be used.[229]

The only examples given in the preamble to the current Part 70 rule are for the latter two situations. For instance, an insignificant change in monitoring that could be processed as a minor permit modification would be a switch from one validated reference test method to another, where the permit does not already provide for an alternative test method.[230] In

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[226] 40 C.F.R. § 70.7(e)(2)(i)(A)(1)-(6).

[227] Knauss, Broome & Ward, supra note 114, at 94.

[228] 57 Fed. Reg. at 32,284.

[229] 40 C.F.R. § 70.7(e)(2)(i)(B).

[230] 57 Fed. Reg. at 32,287.

contrast, a switch from direct measurement of emissions to fuel sampling and analysis, such as switching from emissions monitoring of sulfur dioxide to sampling and analyzing coal sulfur content, would have to be a significant permit modification. The reason is that sources should not be able to change the method of measuring their compliance by using minor permit modifications.[231]

Finally, it should be noted that Part 70 contains special procedures for group processing of minor permit modifications.[232] Under the group processing provision, the permitting authority would collect a batch of a single source's applications for minor permit modifications for three months or until the combined emissions of the changes exceed a certain threshold amount, and then process them all at once. Despite the potential value of group processing, many states have chosen not to allow it.

3. Significant Permit Modifications

The Part 70 rule preamble devotes little space to significant permit modifications. The rule itself, 40 C.F.R. section 70.7(e)(4), is similarly brief. The main reason, of course, is that significant permit modifications are simply defined as every permit revision which is not an administrative permit amendment or minor permit modification, and the procedures are the same as those for permit issuance and renewal.[233] With one or two exceptions, there is little need to discuss significant permit modifications in the review of state programs because the state provisions usually follow Part 70 closely.

It is worth noting several things about significant permit modifications, however. The first is that 40 C.F.R. section 70.7(e)(4)(i) does say that state programs shall contain criteria for determining whether a change is significant. It is not entirely clear whether this

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[231] 57 Fed. Reg. at 32,289.

[232] 40 C.F.R. § 70.7(e)(3).

[233] EPA says that it has not provided a specific model for processing significant permit modifications, but anticipates the procedures will be very similar to those for permit issuance or renewal. 57 Fed. Reg. at 32,289. The rule itself requires state programs to provide that significant permit modifications shall meet all requirements of Part 70 as they apply to permit issuance and renewal.

requirement can be met merely by repeating section 70.7(e)(4)(i)'s basic rule that significant permit modifications are those that do not qualify as minor permit modifications or administrative permit amendments. Section 70.7(e)(4)(i) seems to also say that "at a minimum," state criteria should provide that every significant change in existing monitoring terms, and every relaxation of reporting or recordkeeping terms, must be processed as a significant permit modification. However, since this requirement is the converse of the prohibition against using minor permit modification procedures for changes that involve significant changes to existing monitoring, reporting or recordkeeping requirements,[234] it can probably be satisfied if the state includes the prohibition under the minor permit modification criteria.[235]

Second, even though the complete procedure for permit issuance must be followed, the scope of review for a significant permit modification is limited to the impact of the underlying change in question. An application for a significant permit modification does not open the rest of the permit up again for additional public comment or agency review.[236] Since the process need only focus on the changes to the permit, significant permit modifications should be less complex than permit issuance or renewal.

4. EPA's Proposed Changes to the Permit Revision Procedures

Although a complete review of EPA's proposed changes to the Part 70 flexibility provisions is beyond the scope of this paper, the following summary of the proposed changes to the permit revision procedures is provided. In developing its proposed revisions, EPA has continued to balance the need for procedural safeguards to ensure the integrity of the permitting process with the need for streamlined and expeditious procedures. It has

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[234] 40 C.F.R. § 70.7(e)(2)(i)(A)(2).

[235] 40 C.F.R. § 70.7(e)(4)(i) also makes the observation that nothing precludes a source from making changes consistent with Part 70 that would render existing permit compliance terms and conditions irrelevant. The meaning of this comment is not explained in the preamble.

[236] Public comment must be germane to the applicable requirements implicated by the significant permit modification. Objections to portions of an existing permit that would not be affected by the underlying change would not be germane. 57 Fed. Reg. at 32,290.

determined that greater procedural protections should be afforded for changes that are more significant, but has also decided that procedural protections can be reduced for insignificant changes on de minimis grounds.[237] Essentially, EPA proposes to create a four-track system to match the amount of public process provided to the potential environmental significance of the change.[238] The four tracks are (1) administrative amendments, (2) de minimis permit revisions, (3) minor permit revisions, and (4) significant permit revisions.

The changes to the administrative amendment track would allow incorporation into the permit of enhanced NSR changes made through a state process that fulfills Title V requirements, but a source would not have to wait until the end of EPA's veto opportunity before making the change. This would make it easier to incorporate changes that undergo a prior preconstruction review process. Instead of having to wait until the end of the 45-day period during which EPA can object to the change, the source would be able to begin to construct the change once it received the preconstruction approval and could operate under that change at its own risk 21 days later. Otherwise, the changes that could be made through administrative amendment would remain the same. And, except for NSR changes, they could be made immediately upon submission of an application.

Under the de minimis permit revisions category, Part 70 would provide a more streamlined revision process than for minor permit modifications.[239] The extent of the source's ability to make de minimis changes would have to be described in the permit. Public comment would be allowed on the authorizing permit term at the time it was proposed. A source would be allowed to make a de minimis change seven days after submitting an application to the permitting authority, or as early as the day it submits its application if the permitting authority allows. Public review would not be allowed before each change. However, the public would get monthly batched notice after a group of changes had been

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[237] The de minimis concept relies on Alabama Power Co. v. Costle, 636 F.2d 323 (D.C.Cir. 1979).

[238] Advance Text, *supra* note 12, at 42-43 (preamble, sec. III.E.1).

[239] Proposed Amended 40 C.F.R. § 70.7(f).

made, and citizens could petition the permitting authority to disapprove the change, or failing that, could request that EPA veto it.[240]

The definition of a de minimis change would have two prongs: (1) any change at a small unit (unit-based de minimis), or (2) small changes at big units (increment-based de minimis). EPA is taking comment on proposed alternative criteria for each prong. For example, a unit-based de minimis change for carbon monoxide could be one that did not exceed five tons per year, four tons per permit term, 20 percent of the applicable major source threshold, or any of several other similar alternatives. Increment-based de minimis would have additional restrictions, to prevent a source from altering compliance monitoring terms associated with the permit term the source seeks to change.

The minor permit revisions track would expand the category of eligible changes beyond those currently authorized under minor permit modifications, but would also add a public review process not presently required.[241] Procedurally, minor permit revisions would allow a 21-day public comment period to challenge the eligibility of the proposed change before it could be implemented. *At the close of this comment period*, the source could operate the change "at its own risk" if there were no objections raised and the state or EPA did not act to disapprove the change. If objections were voiced, the source could begin operating the change one week after the close of the comment period if the state or EPA had not sought to block the change by then. A dissatisfied commenter could seek judicial review.

Finally, the significant permit revision track would use the same procedures currently used for significant permit modifications. However, given the broadening of the minor permit revisions track, the scope of changes that would need to be processed as significant permit revisions would be narrowed.

While EPA considers the proposed four-track permit revision process an improvement over the current Part 70 rule, it realizes that a four-track system will require sources and

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[240] Proposed Amended 40 C.F.R. § 70.7(f)(3).

[241] Proposed Amended 40 C.F.R. § 70.7(g).

permitting authorities to make even more distinctions between tracks, and that the relevant gatekeepers may make it difficult to determine which track applies. EPA has even found it necessary to provide several flowcharts that can be used to determine which track applies.[242]

[242] Advance Text, *supra* note 12, at 46 (preamble, sec. III.E.1).

IV. TITLE I MODIFICATIONS AND THE FLEXIBILITY PROVISIONS

A. Overview

An extremely important issue for permit flexibility is what constitutes a Title I modification.[243] Three Part 70 flexibility provisions (off-permit changes, section 502(b)(10) changes, and minor permit modifications) use Title I modifications as a "gatekeeper." In other words, they prohibit changes under their provisions which qualify as Title I modifications, or more precisely, "modifications under any provision of title I."[244] Since Part 70 was issued, the meaning of this term has become very controversial. For the most part, state Title V programs have been adopted on the premise that state "minor new source review" (minor NSR) changes are not within the scope of "Title I modification." During the early stages of program development, EPA made this representation. However, as a result of the permits litigation, EPA reversed course. Now, EPA has proposed that Part 70 be revised to expressly provide that minor NSR changes are Title I modifications.[245]

Essentially, the question under the *current rule* is whether "Title I modification" encompasses changes processed through a state preconstruction review program when the changes do not rise to the level of a major modification under Title I, Part C (Prevention of Significant Deterioration) or D (Nonattainment). Changes that do not reach the major modification threshold must still undergo so-called minor NSR in many states. If "Title I

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[243] *See generally* Advance Text, *supra* note 12, at 9-12 (sec. III.A); Clara G. Poffenberger & Stephen E. Roady, *Modifying Operations under CAA Permitting and New Source Review Requirements*, J. ENVTL. PERMITTING, Autumn 1993, at 485; Michael K. Glenn, *EPA's Stranglehold on "Debottlenecking" and Increased Production in General—Industry Should Not Give Up on This!*, J. ENVTL. PERMITTING, Summer 1993, at 325.

[244] 40 C.F.R. § 70.4(b)(15) (off-permit changes) ("sources [are prohibited] from making, without a permit revision, changes that are not addressed or prohibited by the Part 70 permit, if such changes...are modifications under any provision of title I of the Act"); 40 C.F.R. § 70.4(b)(12) (operational flexibility) ("sources [may] make section 502(b)(10) changes without requiring a permit revision, if the changes are not modifications under title I of the Act...."); 40 C.F.R. § 70.7(e)(2)(i)(A)(5) (minor permit modifications) (minor permit modification procedures may be used only for those permit modifications that: ...are not modifications under any provision of title I of the Act....").

[245] Advance Text, *supra* note 12, at 9-12 (preamble, sec. III.A).

modification" is interpreted to include minor NSR changes, the effect will be that more minor changes will be encompassed within this gatekeeper, and the flexibility provided by the current rule, especially under minor permit modification procedures, would be narrowed even further.

Title V refers to Title I modifications only once. CAA section 502(b)(10) requires state programs to contain provisions for operational flexibility changes that do not require a permit revision, "if the changes are not modifications under any provision of subchapter [Title] I of this chapter and the changes do not exceed the emissions allowable under the permit...." The legislative history of section 502(b)(10) does not explain what Congress meant by the term "modifications under any provision of [Title] I."[246]

B. The Development of New Source Review and the Term "Modification"

An historical overview of the evolution of NSR programs and the term "modification" is necessary to understand the legal argument on this issue. The term "modification" first appeared in the 1970 CAA,[247] in connection with New Source Performance Standards (NSPS). CAA section 111 established requirements for new sources to meet NSPS. New sources were defined as stationary sources that underwent construction or modification. Modification in turn was defined in section 111(a)(4) as:

> [A]ny physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.[248]

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[246] However, Senator Chafee did opine that: "Under the language of title I, the question whether any particular changes constitutes a 'modification' will depend -- not only on the nature of the change itself -- but will also depend upon the air quality of the area in which the facility seeking to make the change is located." 136 Cong. Rec. S16,933, 16,942 (daily ed. Oct. 27, 1990).

[247] Pub. L. No. 91-604 (Dec. 31, 1970).

[248] 42 U.S.C. § 7411(a)(4). EPA then altered the definition in the implementing regulations to focus on changes that caused increases in the emission rate. "[A]ny physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of the Act." Glenn, *supra* note 243, at 327.

Also in 1970, section 110(a)(2)(D) required SIPs to include procedures for review "prior to construction or modification" of those new sources to which the NSPS would apply.[249]

The 1977 amendments to the CAA broadened the use of the term "modification" when it created the new source review (NSR) program for attainment (PSD) and nonattainment areas.[250] In Part C, CAA section 165 provided that no major emitting facility in a PSD area could be constructed without a permit.[251] In turn, section 169(2)(C) defined the term "construction" to include modification, as that term was defined in section 111(a)(4).[252] In Part D, sections 172(b)(5), (6), and 173[253] required new or modified stationary sources to obtain permits to construct and operate[254] anywhere in a nonattainment area. In section 171(4), the term "modified" was defined by reference to "modification" in section 111(a)(4)(sources subject to the NSPS).[255] Thus, both Parts C and D defined the term modification by reference to the established NSPS definition.

Although the Part C and D definitions of modification referenced the NSPS definition, EPA's implementing regulations created a new definition. EPA determined that a physical or operational change would have to result in a *major* modification to trigger the requirements for an NSR construction permit in both nonattainment and PSD areas.[256] EPA

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[249] 42 U.S.C. § 7410(a)(2)(D).

[250] Pub. L. No. 95-95 (Aug. 7, 1977). Actually, the term "new source review" or NSR, technically refers only to preconstruction review in nonattainment areas. However, it is commonly used to refer to preconstruction review programs in PSD areas as well.

[251] 42 U.S.C. § 7475.

[252] 42 U.S.C. § 7479(2)(C).

[253] 42 U.S.C. §§ 7502(b)(5), (6); 7503.

[254] The term "construct and operate" does not mean that the construction permit required by an NSR permit program is also an operating permit. It simply means that the source is allowed to construct the new facility or modification and then operate it at start-up using the prescribed technology.

[255] 42 U.S.C. § 7501(4).

[256] The nonattainment area NSR requirements are found at 40 C.F.R. § 51.165. This section requires that each SIP "shall adopt a preconstruction review program to satisfy the requirements of sections 172(b)(6) and 173 of the Act for any area designated nonattainment for any national ambient air quality standard under 40 CFR 81.300 et seq. Such a program

defined a major modification as one that exceeds certain significance levels established by the regulations. For example, a major modification in a nonattainment area means:

> any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.[257]

The term "significant" was defined to mean:

> in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:
>
> Pollutant Emission Rate:
>
> Carbon monoxide: 100 tons per year (tpy)
> Nitrogen oxides: 40 tpy
> Sulfur dioxide: 40 tpy
> Ozone: 40 tpy of volatile organic compounds
> Lead: 0.6 tpy.[258]

Any increase in emissions below these significance levels was considered de minimis.

A very important development is that section 110(a)(2)(D) was also amended in 1977. Where section 110(a)(2)(D) had formerly applied only to NSPS, it now required each SIP to include a program to provide for:

> [T]he regulation of the modification and construction of <u>any</u> stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D[.][259] (emphasis added).

This was the genesis of state minor NSR programs. Whereas the NSR required by Parts C and D can be described as major NSR because it applies to construction of major sources (in

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shall apply to any new major stationary source or major modification that is major for the pollutant for which the area is designated nonattainment, if the stationary source or modification would locate anywhere in the designated nonattainment area." The PSD preconstruction review requirements are found at 40 C.F.R. § 51.166.

[257] 40 C.F.R. § 51.165(a)(1)(v)(A). Note that a physical change or change in the method of operation does not include routine maintenance, repair, and replacement; use of alternative fuels in certain prescribed situations; an increase in the hours of operation or in the production rate, unless such change is prohibited under federally enforceable permit conditions; or, any change in ownership. 40 C.F.R. § 51.165(a)(1)(v)(C).

[258] 40 C.F.R. § 51.165(a)(1)(x).

[259] 42 U.S.C. § 7410(a)(2)(D)..

nonattainment areas), major emitting facilities (in PSD areas), and major modifications (in both areas), state review of the planned construction or modification of *any* source is called state or minor NSR. It should be noted, however, that most minor NSR programs exempt certain insignificant activities.

CAA section 110(a)(2)(D) has since been amended to section 110(a)(2)(C). Even though section 110(a)(2)(C) requires state minor NSR programs approved into the SIP, each state is free to define what a "modification" is for the purposes of its minor NSR program. For example, in Georgia, the minor NSR program is established by the following requirement:

> Any person prior to beginning the construction or modification of any facility which may result in air pollution shall obtain a permit for the construction or modification of such facility from the Director.[260]

Georgia then defines "modification" as:

> [A]ny change in or alteration of fuels, processes, operation or equipment, (including any chemical changes in processes or fuels) which affects the amount or character of any air pollutant emitted or which results in the emission of any air pollutant not previously emitted.[261]

The Georgia definition is broader than the EPA regulatory definition of major modification. It refers to any change which "affects" the amount of any air pollutant emitted. The word "affects" can include decreases as well as increases.

However, the fact that each state can define "modification" for its minor NSR program does not necessarily mean that a modification under a minor NSR program is excluded from being considered a Title I modification. The argument in favor of including minor NSR within the term "modification under any provision of title I" is very simple. The argument is that since EPA approves under Title I any SIP which contains a state minor NSR program, any modification under such a program must be a "modification under any provision of title I."

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[260] Georgia Air Quality Control Rule 391-3-1.03(1) (1993).

[261] Georgia Air Quality Control Rule 391-3-1.01(gg).

C. Part 70's Approach to Title I Modifications

When EPA issued the May 1991 proposed rule, it did not squarely address the issue of whether a modification under a state minor NSR program was a Title I modification. The closest it came was in the very important footnote 6:

> Title I of the Act includes several different definitions of "modification" for purposes of different programs. For purposes of the new source performance standards (NSPS), the statutory definition of "modification" is found at 11(a)(4)[sic], and EPA's implementing regulations are found at 40 CFR 60.14. For nonattainment new source review (NSR), see sections 171(a)(4), 182(c)(6) and 182(c)(7) of the Act, as well as 40 CFR 51.165(a)(1). Section 51.165(a)(1)(x), in particular, exempts from treatment as a modification (for NSR purposes) a change resulting in a net emissions increase below the following levels: CO -- 100 tons/year; NOx, SO2 and VOC -- 40 tons/year; lead -- 0.6 tons/year. New section 182 of the Act, however, now sets lower de minimis levels for various ozone nonattainment classifications. For attainment area new source review (prevention of significant deterioration, or PSD), see section 165(a) and 169(1)(c) of the Act, and 40 CFR 51.166(b). Revised section 112(b)(6) of the Act provides that PSD shall not apply to the toxic air pollutants listed in revised section 112(b)(1). EPA plans to revise the NSR and PSD regulations to reflect these statutory changes. For sources of hazardous air pollutants, see section 112(a)(5) and 112(g)(1)(A), for which EPA has yet to develop implementing regulations.
>
> Some States may have more expansive definitions of "modification" than required under Federal law, which the States use to impose BACT or other new source requirements. The EPA encourages States to examine whether they wish to use the State or the Federal definition of modification to require permitting under title V. The EPA does not interpret title V to require that the definition of "modification" must be identical as a matter of State law for the purposes of both reopening the permit and imposing substantive new source requirements. The State may use the Federal definitions of modification under title I to trigger permitting, while retaining its own definition of modification for imposing new source requirements, which may be informal, such as those described below for permit amendments. For title V permits, however, the State definition at least must be consistent with the definition of modification contained in the federally-approved. [sic][262]

Depending on one's point of view, footnote 6 can be considered to include or exclude minor NSR from the definition of Title I modification, or it can be viewed as ambiguous. The statement that section 51.165(a)(1)(x) exempts de minimis changes from treatment as a NSR modification, together with the second paragraph reference to state definitions of modification, seems to indicate that such changes would not be considered Title I

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[262] 56 Fed. Reg. at 21,746-47 n.6.

modifications. EPA now admits that in conjunction with footnote 5, which refers to footnote 6 for what constitutes a Title I modification, the phrase Title I modification in the May 1991 proposal would impliedly exclude minor NSR modifications.[263]

In the final rule, neither Part 70 nor its preamble expressly defines "modification under any provision of title I." Nor does it explicitly address the issue of minor NSR and Title I modifications. The preamble does reference a Department of Justice opinion which happens to define Title I modification to exclude minor NSR, although that definition is not apparent from the reference to the opinion in the preamble itself.[264]

The preamble also discusses minor permit modifications at length. During the course of that discussion, a number of comments are made ... seem to imply that a change that would qualify for minor NSR but not major NSR would not be a Title I modification. For instance, the preamble states that:

> no revision may be processed as a minor modification if it would constitute a title I modification. By regulation, EPA has limited modifications under parts C (prevention of significant deteriorations) and D (nonattainment) of title I to changes that would not increase emissions beyond certain "significance levels." These significance levels...have never been challenged and remain in effect. See 40 CFR @ 51.165(a)(1)(x)...In fact, Congress endorsed this de minimis approach in the 1990 Act Amendments. It did so in part by setting specific statutory de minimis levels for major modifications in certain areas, and by leaving in EPA's other de minimis exceptions undisturbed. See, e.g., sections 182(d)(6) and 182(e)(2). The minor permit modification track is therefore limited to increases in emissions levels long recognized under the Act as insignificant.[265] (emphasis added).

Modifications that do not result in "significant" increases in emissions (those that do not rise to the major NSR significance levels) are those that are processed by minor NSR. If minor permit modification procedure can be used for such changes, then such changes clearly cannot be Title I modifications. Minor permit modification procedure is not available for changes that are Title I modifications.

In addition, in connection with discussing the concept of stacking successive emission

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[263] Advance Text, *supra* note 12, at 10 (preamble, sec. III.A).

[264] 57 Fed. Reg. at 32,281.

[265] 57 Fed. Reg. at 32,285.

increases, the preamble implies that minor NSR changes are not Title I modifications :

> the Act implicitly prohibits "stacking" of emissions increases under the minor permit modification procedures. The EPA has long held that stacking is unlawful where it is done for the purpose of improperly evading full permit modification procedures under title I. See, e.g., 54 FR 27274, 27281 (June 29, 1989) (prohibition against use of "sham" minor source permits for purpose of evading major NSR requirements under title I).[266]

In this passage, only major NSR requirements are referred to as coming under Title I.

Although Part 70 did not expressly answer the question whether minor NSR is excluded from the concept of Title I modifications, EPA staff did make that representation at a series of workshops on Part 70 with states and industry during August - December 1992. States then designed their Title V programs under the belief that Title I modifications would not include modifications processed under their minor NSR programs. In their Title V programs, most states took the position, either expressly or impliedly, that minor NSR changes were not Title I modifications.

For example, Louisiana defined "Title I modification" as:

> any physical change or change in the method of operation of a stationary source which increases the amount of any regulated air pollutant emitted or which results in the emission of any regulated air pollutant not previously emitted and which meets one or more of the following descriptions:
>
> a. the change will result in the applicability of a standard of performance for new stationary sources promulgated pursuant to section 111 of the Clean Air Act;
>
> b. the change will result in a significant net emissions increase under the program for the Prevention of Significant Deterioration, as defined in LAC 33:III.509;
>
> c. the change will result in a significant net emissions increase under the program for Nonattainment New Source Review, as defined in LAC 33:III.504;
>
> d. the change will result in the applicability of a maximum achievable control technology (MACT) determination pursuant to regulations promulgated under section 112(g) (Modifications, Hazardous Air Pollutants) of the Clean Air Act.[267]

By referencing only the NSPS, PSD and nonattainment NSR, and hazardous air pollutant

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[266] 57 Fed. Reg. at 32,284.

[267] LA. ADMIN. CODE tit. 33, § 502.

programs required by the CAA, Louisiana in effect excludes minor NSR modifications from the term "Title I modifications.".

D. EPA Reverses Its Position

During the public comment period for developing its Title V rules, Louisiana received a comment from EPA that the issue of whether to include minor NSR changes in the definition of Title I modifications was now considered unresolved at the national level.[268] In response, Louisiana pointed out that Part 70 did not include a definition of the term, and that it had based its definition on footnote 6 in the proposed rule, which had indicated that a Title I modification would include any change to which NSPS standards would apply, any major modification under the nonattainment or PSD NSR programs, and any modification under CAA § 112(g) (but not any minor NSR modification). Louisiana further remarked that it had been provided similar guidance at a meeting held at the EPA Region 6 office in December, 1992, and had confirmed its understanding in follow-up correspondence to EPA.[269]

The switch in EPA's position on the meaning of "Title I modification" during the period between December 1992 and August 1993 was caused by the permits litigation. EPA was simply persuaded that the better legal interpretation of Title I modification included minor NSR modifications, and that the integrity of minor NSR programs was linked to the major NSR program.[270] EPA did begin to communicate its revised interpretation to the states. This caused Texas to seek to intervene in the permits litigation on October 1, 1993, well after the expiration of the intervention deadline.[271] Texas' grounds for its late motion were that it

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[268] Letter, A. Stanley Meiburg, Director, EPA Region VI Air, Pesticides and Toxics Division to David Hughes, La. Dept. of Envtl. Quality, Aug. 25, 1993.

[269] Louisiana Title V Submittal, *Comments Submitted for General Regulations on Air Quality Permitting Procedures*, Title 33:III.Chapter 5, Log #AQ70, Nov. 15, 1993, response to comment no. 155.

[270] Advance Text, *supra* note 12, at 11 (preamble, sec. III.A).

[271] Motion of State of Texas for Leave to File Motion for Leave to Intervene Out of Time, Oct. 1, 1993, CAIP v. EPA, No. 92-1303 (and consolidated cases)(D.C.Cir. filed July 16, 1992).

would be subject to any new or modified requirements that EPA may adopt under Title V as a result of the disposition of the case through settlement negotiations.

Interestingly, Texas characterized the issue differently from whether a minor NSR change is a Title I modification. Texas phrased the issue as whether the Part 70 definition of "applicable requirement" includes Texas' rigorous minor NSR program.[272] Texas indicated it was concerned that if the term "applicable requirement" included the minor NSR program, "changes at any facility subject to the minor NSR program would be subject to "Part 70 operating permit revision procedures, requiring additional and unnecessary review and delay in the NSR process causing significant damage to Texas' NSR program."[273]

Texas argued that it had good cause for submitting the motion out of time:

> In the course of developing its operating permit program pursuant to the final rule, Texas was working under the assumption, and pursuant to an understanding with EPA regional officials, that the final rule would not interfere with its NSR program, and that Texas minor NSR was not an "applicable requirement." However, over the course of several meetings from late-April through mid-June 1993, EPA informed Texas officials that it had made a determination that Texas' approach -- that the term "applicable requirement" does not include Texas' minor NSR program -- was unacceptable, and that Texas' operating permit program could, therefore, be disapproved.[274]

One might wonder why Texas phrased the issue in terms of "applicable requirement" rather than "Title I modification." The reason could be that EPA's summary of issues filed as part of a document in the litigation on August 20, 1993 clearly stated that the definition of applicable requirement was an issue, but did not expressly touch on the Title I modification issue (although it did list the scope of permissible minor permit modifications as an issue).[275] It is likely that Texas wanted to fit its motion into an established issue in the case.

In any event, a number of states were taken aback by the reversal in EPA's position.

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[272] Texas' Motion, at 2-3.

[273] Id. at 3.

[274] Texas' Motion, at 3.

[275] Respondent's Briefing Format Proposal, at 4-7.

And, opposition from industry became apparent.[276] EPA now seems to have decided that the best course is to change the interpretation of Title I modification in its proposed revisions to Part 70, and in the meantime to conduct a separate rulemaking to revise Part 70 to allow it to grant interim approval to state programs that exclude minor NSR changes from the definition of Title I modification.[277]

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[276] *See, e.g.*, letter, William H. Lewis, Clean Air Implementation Project Counsel, Morgan, Lewis & Bockius, to Mary Nichols, EPA Assistant Administrator, Office of Air and Radiation, *Definition of Title I Modification Under EPA's Operating Permit Regulations*, May 10, 1994. "I understand that consideration has been given within EPA to releasing guidance that would provide that changes resulting in de minimis increases of criteria pollutants, possibly referred to as changes made through "minor new source review," constitute Title I modifications under the Title V regulations as now written."

[277] Advance Text, supra note 12, at 11-12 (preamble, sec. III.A).

V. SEPARATE V. INTEGRATED PERMIT PROGRAMS

As noted previously, Title V is not the first air pollution-related permit program. Historically, there have been two main types of permits in the air pollution field: construction permits and operating permits. Since 1977, the CAA has required states to have NSR programs requiring construction permits to build new major stationary sources or to physically modify such facilities. In addition, although not federally required, many states have also had their own operating permit programs. This section discusses how Title V interfaces with these existing permit programs, focusing especially on the relationship between Title V permitting and NSR permitting and the advantages and disadvantages of the very few state programs that have sought to integrate construction and operating permit systems.[278] The implications for the Part 70 flexibility provisions are significant.

A. Operating Permit Programs

Until Title V, the CAA contained no requirement for air operating permit programs. However, many states have had their own operating permit programs for years. For example, Georgia, California's Ventura County, Florida, Texas and numerous other states have been in the air permitting business since 1972.[279] In its May 1991 Part 70 proposal, EPA cited a survey that showed about 40 state programs issue operating permits, at least to new or modified sources. Over half of those programs address both new and existing sources and require renewal of permits periodically.[280]

In the May 1991 Part 70 proposal, EPA noted that many of the state operating permit programs appeared to have most of the basic components required by Title V for issuing

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[278] To date, the only states to submit integrated programs as part of their Title V program submissions have been Louisiana, Arizona, Hawaii, and Minnesota. This paper reviews Louisiana's program.

[279] *E.g.*, Georgia Title V Program Submittal, *Program Description*, Nov. 12, 1993, at 4.

[280] 56 Fed. Reg. at 21,713. *See also* S.REP No. 228, 101st Cong., 1st Sess., 346-47 (1989)(reporting 35 states with their own operating permit programs).

permits, collecting fees, providing for public participation, reopening permits, and issuing permits for a fixed term.[281] However, since not all of the states had their own operating permit programs, and most of them did not conform in their entirety to the Title V basics, there plainly was a need for a uniform federal requirement. Nevertheless, EPA proclaimed that one of the Part 70 implementation principles would be to build upon existing operating permit programs and to provide the States with regulatory flexibility wherever possible to maintain existing program elements in implementing Title V.[282]

Since Title V is an operating permit program, the relationship with existing state operating programs is relatively simple. A state can either change its existing operating permit regulations to incorporate Part 70 requirements, or create a Part 70 program that stands alone, but is administered by the same personnel with experience in permitting. The sources that are subject to Part 70 will be permitted under Part 70 rules and those that are not will be permitted under the existing state procedures. For example, in developing its Title V program, Georgia retained its existing operating permit rules and simply created a new section in the rules called Title V Operating Permits.[283] The issuance of an operating permit under Title V supersedes any requirement to obtain an operating permit under the existing state operating permit program.[284]

B. The Relationship Between Title V and New Source Review

The most significant issues involve the relationship between construction permit programs and Title V operating permit programs. The difference between construction permits and operating permits is fairly simple. A construction permit simply authorizes a

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[281] 56 Fed. Reg. at 21,713.

[282] *Id.*

[283] Georgia Air Quality Control Rule 391-3-1.03 (2)(operating permits); Georgia Air Quality Control Rule 391-3-1.03(10)(Title V operating permits).

[284] Georgia Title V Program Submittal, *Title V Operating Permits - Response to Comments Received on Public Review Drafts - As of Oct. 15, 1993*, Comment 4, at 4.

source to build a facility or modification. Although the facility or modification must meet certain emissions limitations imposed by technology requirements at start-up, the permit does not control what the source does after it begins operation. An operating permit, on the other hand, governs a source's emissions on a continuous basis after operations commence. EPA has encouraged integrated NSR/Title V permits, but there are difficult issues of timing and revisions that can affect operational and permit flexibility.

1. Part 70 Rules

In the May 1991 proposal, EPA tentatively supported integrated NSR and Title V programs:

> The EPA intends that the title V rulemaking provide the basis for opportunities to establish a permit program to consolidate the review of a source's impact with respect to the Clean Air Act and to other environmental media. In particular, the Agency encourages close coordination of the preconstruction and operating permit review programs for air to minimize duplication and delay. Comments are specifically solicited as to how integrated permitting can be promoted and not inhibited by this rulemaking.[285]

EPA went on to note that requirements under NSR programs, such as technology-based controls,[286] define applicable SIP requirements for a Title V source which, "if they are not otherwise changed, can be incorporated without further review into the operating permit for the source."[287] EPA saw some positive benefits in the relationship between NSR and operating permit programs:

> The requirement under title V that operating permit programs assure compliance with all applicable requirements under the Act includes the requirements imposed in any NSR permit. Any requirements established during the preconstruction review process also apply to the source for purposes of implementing title V. If the source meets the limits in its NSR permit, the title V operating permit would incorporate these limits without further review. The intent of title V is not to second-guess the results of any State NSR program....[288]

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[285] 56 Fed. Reg. at 21,715.

[286] Lowest achievable emission rate (LAER) for nonattainment areas; best available control technology (BACT) for PSD areas.

[287] 56 Fed. Reg. at 21,721.

[288] 56 Fed. Reg. at 21,738-39.

In the final Part 70 rules, EPA determined that:

> State and local permitting authorities have the option, but not a mandate, to integrate requirements determined during preconstruction review with those required under title V. Such integration would be consistent with the previously stated implementation goals of combining programs and building on existing State programs which typically have already accomplished such integration at the State level. As discussed above, if NSR is integrated with the procedural and compliance-related requirements contained in §§ 70.6, 70.7, and 70.8 (including opportunity for EPA and affected State review), an existing title V permit can be administratively revised to reflect the results of the integrated NSR process.[289]

The latter sentence refers to "enhanced" NSR programs, which provide the basis for incorporation of NSR requirements through the administrative permit amendment process.

The above-quoted EPA comments raise a question about what an integrated Title V/NSR program really is. The comments seem to be referring to the integration of NSR requirements into an existing Title V permit. In other words, they envision the situation where a source with an existing Title V permit plans a modification that triggers NSR, and the state NSR requirements are then incorporated into the operating permit. But this does not address the most difficult situation that can arise in an integrated construction and Title V operating permit program.

A true integrated program is one that also provides for a source that is seeking a construction permit, but does not have a Title V operating permit, to be issued both at the same time. Part 70 does not really address the perplexing questions that can arise in programs that issue joint Title V operating permit-construction permits.

2. Integrated Title V/NSR Permit Program Issues

The primary issue with an integrated program is staleness. In the preconstruction scenario, where the source seeks a permit at a point before construction that will govern both construction and operation, the application for the permit could be submitted well before operation begins. It may take one or more years to construct a facility. At the point before construction even starts, there may be significant gaps in knowledge about the source's

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[289] 57 Fed. Reg. at 32,259.

eventual operations. It may be very difficult to anticipate all of the detailed operating requirements that would apply to the source under Title V and to address them in a permit that will be issued before the source is even built. A permit issued under such circumstances could be stale before operation even begins.

It would seem that there must be a procedural mechanism to revise the application and permit to incorporate terms and conditions that will cover changes in operations as construction and facility start-up progress. If the mechanism is the Part 70 permit revision process, then there may indeed be a more burdensome system than if the operating permit was to be issued only after the source was actually in operation. In addition, emission levels sometimes must be adjusted in construction permits after technology-based control equipment is installed, when "shakedown" testing reveals differences in the emission levels that had been expected. How to make such adjustments is another significant issue, but one that would exist even in construction permit programs that stand alone.

Integrated programs have been expected to pose severe administrative headaches because of the burdens of extending the more elaborate Part 70 review process to the preconstruction review stage. There are also flexibility issues with an integrated program. If a source wants to make an operational change, construction may be necessary to modify the production facility, requiring a construction permit. Although operational flexibility may allow a source to escape revising the Title V portion of an integrated permit, this would not necessarily be an advantage if the source has to wait for a construction permit. In some states, it can take six months or more to obtain a construction permit. Of course, the same situation could arise even where programs are not integrated. Commentators have suggested that states need to streamline their minor NSR programs with the operational permitting flexibilities allowed by Title V. Industry pushed EPA for the ability to do this and should push state agencies to integrate these two programs.[290]

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[290] McAvoy, *supra* note 134, at 27-28.

C. Separate Programs

As a result of these issues and concerns, most states have decided to maintain separate Title V and NSR permit programs. Texas is one of the states that has articulated its rationale for doing so. Texas believes that the requirements of its current extensive NSR program should remain intact and independent of the implementation of the Title V program.[291] Texas reports that it carefully considered and compared the two permitting programs, concluding that two key factors warranted keeping them separate. First, the universe of sources covered by the programs are different (Texas' NSR program applies to more sources than Part 70). Second, the goals of the two programs are different (see discussion below). As a result of these factors, Texas believes that "combining NSR and operating permits into one permit would not be beneficial to the state and would significantly interfere with the issuance of NSR authorizations."[292] Texas instead views the Part 70 program as a "useful complement to the existing preconstruction permit program rather than as a surrogate or replacement."[293]

Texas' NSR program[294] requires a permit (often referred to in Texas' Title V regulations as an "authorization") before *construction* of every new facility or modification of an existing facility, whether major or minor, unless exempt.[295] A facility is broadly defined to include any "point of origin" of air contaminants. Thus, Texas' NSR program is much

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[291] 18 Tex. Reg. 5989, 5990 (Sept. 7, 1993).

[292] Karen N.T. Olson, Manager, Operating Permits Program, Permitting Division, Texas Natural Resource Conservation Commission, *Implementation of the Part 70 Operating Permits Program in Texas, paper for* the ABA Section of Natural Resources, Energy and Environmental Law's 23rd Annual Conference on Environmental Law, Keystone, Colo., Mar. 10-13, 1994, at 4.

[293] Letter, John Hall, Chairman, Texas Natural Resource Conservation Commission, to Mary Nichols, EPA Assistant Administrator, *February 15 Meeting on Title V With Texas Delegation* (Mar. 21, 1994), at 1.

[294] TEX. ADMIN. CODE tit. 30, Chapter 116 (May 4, 1994). Chapter 116 is entitled Control of Air Pollution by Permits for New Construction or Modification. Chapter 116 is often referred to in Texas as Regulation VI.

[295] TEX. HEALTH & SAFETY CODE ANN. § 382.0518; TEX. ADMIN. CODE tit. 30, § 116.110. There are standard exemptions for small facilities with insignificant emissions. TEX. HEALTH & SAFETY CODE ANN. § 382.057; TEX. ADMIN. CODE tit. 30, § 116.211.

broader than Part 70, which applies only to major sources.

In addition, Texas views the purpose of Part 70 as codifying already existing federally enforceable requirements into one document, with the only new requirements consisting of monitoring, recordkeeping, reporting and compliance certification. On the other hand, Texas considers its NSR program to exist to protect public health and welfare.[296] It achieves this purpose by requiring Best Available Control Technology for all new construction or modification (unless exempt), and ambient air impact review with health effects evaluation.[297]

Texas is further concerned about the different processes involved in the two types of programs. Texas points out that 40 C.F.R. section 70.5(a)(1)(ii) has an important impact. That section allows sources that are required to obtain a construction permit for a new facility or a modification at an existing facility to wait to file an application for a Title V permit or permit revision for 12 months after commencing operation.[298] The rationale behind allowing sources that have obtained a construction permit to wait to apply for a Title V operating permit or permit revision is that when a source has gone through Title I, Part C or D NSR review, and has installed technology-based controls (LAER or BACT), it should not have to delay further in order to begin operation.

In effect, the application delay authorized by 40 C.F.R. section 70.5(a)(1)(ii) constitutes post-operation permit review. In the case of a modification, a source with an existing Title V permit is operating off-permit for 12 months. Such a Part 70 process would interfere with Texas's state NSR program, if the two processes were combined. A source may not even begin construction without an NSR permit or authorization in Texas. If

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[296] Letter, John Hall to Mary Nichols, *supra* note 298, at 2.

[297] TEX. ADMIN. CODE tit. 30, § 116.111(3).

[298] 40 C.F.R. § 70.5(a)(1)(ii): "Part 70 sources required to meet the requirements under section 112(g) of the Act, or to have a permit under the preconstruction review program approved into the applicable implementation plan under part C or D of title I of the Act, shall file a complete application to obtain the part 70 permit or permit revision within 12 months after commencing operation or on or before such earlier date as the permitting authority may establish. Where an existing part 70 permit would prohibit such construction or change in operation, the source must obtain a permit revision before commencing operation."

construction and operating permits were combined into one, the application delay plus the extended period for EPA review, approval, and notice to affected states would substantially slow the time-critical preconstruction NSR review.[299] Of course, the permitting authority may require Title V sources to apply for a Title V permit or permit revision sooner than 12 months after commencing operation if it wishes. Still, there would be a concern about the delay in issuing a construction permit that would be caused by the Part 70 review process.

Texas has administratively codified its decision to keep the NSR and Title V programs parallel.[300] Texas provides that "[n]one of the requirements in this chapter [Chapter 122, Federal Operating Permits] shall be construed as prohibiting the construction of new or modified facilities, provided that the owner or operator has obtained any necessary preconstruction authorization...."[301]

D. Integrated Programs

Louisiana's Title V submittal reports that its operating permit program fully integrates the Part 70 permit processing requirements with the existing Louisiana preconstruction and operating permit procedures.[302] The Louisiana program concept is that a preconstruction permit issued by the Louisiana Department of Environmental Quality (LDEQ) to a Part 70 source will serve as the Part 70 operating permit.[303]

Before Title V, Louisiana's permit program required that any source of air contaminants in the state obtain a permit before any construction, reconstruction, modification, or even any decrease in emissions. Permits were required before any change that would constitute a CAA Title I modification under the PSD or nonattainment NSR

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[299] Olson, *supra* note 292, at 5.

[300] 18 Tex. Reg. at 5991.

[301] TEX. ADMIN. CODE tit. 30, § 122.161(b)(1993).

[302] Louisiana Title V Submittal, *Description of Louisiana's Operating Permit Program*, Nov. 15, 1993, at 1.

[303] *Id.* at 2.

programs. In addition, permits were also required for changes in emissions that were below the PSD and nonattainment NSR significant net increase thresholds, and for sources that were minor by PSD and nonattainment NSR thresholds.[304]

After the integration of the Part 70 program, the LDEQ will continue to administer the existing permit program for non-Part 70 sources. However, the existing permit application system will be enhanced by including Part 70 public notice, affected state, and EPA review requirements and Part 70 permit issuance timeframes, to ensure it addresses all information required by Part 70, as well as all state required information. The LDEQ will still review an application from a Part 70 source and issue the permit before construction or modification.[305]

Chapter 5 of Louisiana's Environmental Quality Regulations[306] establishes the integrated permit program. It provides that "[n]o construction, modification, or operation of a facility which ultimately may result in an initiation or increase in emission of air contaminants...shall commence until the permit application has been approved...and a permit...has been issued."[307] It further provides that "[e]ach permit issued shall fulfill the requirements to obtain both a preconstruction and an operating permit in accordance with state and federal air quality programs.[308]

While this seems relatively straightforward, it would hardly make sense to impose Part 70 permit requirements on sources that do not need to comply with them. Thus, the structure of Louisiana's regulations is to define "Part 70 source" in accordance with 40 C.F.R. section

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[304] *Id.* at 1. However, LA. ADMIN. CODE tit. 33, § 503.B. provides that minor sources may meet their permitting requirements by applying for an exemption, obtaining a small source permit (if potential to emit is less than 25 tons per year) or by using a general permit.

[305] La. Program Description, *supra* note 302, at 2.

[306] LA. ADMIN. CODE tit. 33, Part III, Ch. 5 (Nov. 20, 1993).

[307] LA. ADMIN. CODE tit. 33, § 501.C.1.

[308] LA. ADMIN. CODE tit. 33, § 501.C.8.

70.3(a)'s Applicability section,[309] and then identify which additional requirements imposed by Part 70 apply to a Part 70 source in a particular case. Nonattainment NSR procedures are listed separately from Part 70 operating permit procedures.[310] Under the Part 70 procedures, any source which will constitute a Part 70 source and for which construction will commence after the effective date of the Louisiana Part 70 program shall submit a permit application prior to construction.[311]

Louisiana attempts to take care of the problem of needing to adjust permit emission levels as a result of shakedown testing by providing special procedures for incorporating test results.[312] Any permitted facility can request a permit amendment or modification to reflect the results of any testing required or approved by the LDEQ, if such testing demonstrates that the terms and conditions of the existing permit are inappropriate or inaccurate.

Changes to render preconstruction permit terms and conditions consistent with emissions data and operating parameters as determined by start-up testing results may be made as an administrative amendment if certain conditions are met.[313] Those conditions are that the changes are a result of tests performed upon start-up of newly constructed, installed, or modified equipment or operations, increases in permitted emissions will not exceed five tons per year for any regulated pollutant, increases in hazardous air pollutants would not exceed state and federal limits, changes in emissions would not require NSR and would not trigger any Part 70 applicable requirements, changes in emissions would not qualify as a significant modification, the request is submitted no later than 12 months after commencing operation, and the permit allows such changes by administrative amendment.[314]

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[309] LA. ADMIN. CODE tit. 33, § 502.

[310] LA. ADMIN. CODE tit. 33, § 504 (Nonattainment NSR Procedures; LA. ADMIN. CODE tit. 33, § 507 (Part 70 Operating Permits Program).

[311] LA. ADMIN. CODE tit. 33, § 507.C.2.

[312] LA. ADMIN. CODE tit. 33, § 523.

[313] LA. ADMIN. CODE tit. 33, § 521.A.5.

[314] LA. ADMIN. CODE tit. 33, § 523.A.1.

If all these requirements are not satisfied, then a change to incorporate test results can only be made in accordance with Part 70 minor or significant modification procedures.[315] In any case, Louisiana allows for temporary exemption from requirements to revise a permit before making a change in emissions in order to allow tests to determine the effect of a proposed modification on emission rates, where such exemption is not prohibited under Part 70 or any applicable requirement and will not place ambient air standards in jeopardy during the testing period.[316]

The administrative amendment procedure for testing results is not expressly authorized by Part 70.[317] However, an integrated permit program needs the flexibility to adjust LAER or BACT emission levels after initial testing of a facility. Louisiana's procedures for incorporating test results should be considered acceptable; otherwise, there would be no way to incorporate start-up test results into permits easily.

Although Louisiana has dealt with the problem of start-up test result changes, there does not seem to be any streamlined or efficient system for revising permits that have not anticipated all the operational details at the preconstruction stage. Louisiana apparently imposes the same permit revision process for minor and significant modifications that Part 70 requires.[318] Thus, a source that needs a change which qualifies as a significant modification will have to go through the same process as required for initial permit issuance.

Louisiana's combined permit program was opposed by most industrial sources, mainly on the basis that the process of applying for and obtaining permits and permit revisions would create intolerable administrative burdens for industry and the LDEQ. During public hearings, an oil company (Conoco) complained about the likelihood that huge numbers of permits and permit modifications would overwhelm the technical capabilities of the system, as well as

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[315] LA. ADMIN. CODE tit. 33, § 523.A.2.

[316] LA. ADMIN. CODE tit. 33, § 523.B.

[317] 40 C.F.R. § 70.7(d).

[318] LA. ADMIN. CODE tit. 33, § 525 (minor modifications); LA. ADMIN. CODE tit. 33, § 527 (significant modifications).

expected delays in the initiation of construction of important projects due to the longer procedures that would be required to achieve duplicate state and federal review. Conoco argued that projects required by other regulations, such as MACT standards, might not be completed by the required dates due to construction delays caused by permitting. Conoco concluded by pointing out that neighboring states (Texas and Oklahoma) had recognized the administrative burdens that would be associated with a single program.[319]

On the other hand, some in the regulated community supported Louisiana's approach. For instance, two electric utilities perceived an integrated permit program as a progressive move, although it might cause short-term pain for long-term gain. They argued that other states were merely layering the new Title V program on top of their existing system, creating a dual permit system that would be more inefficient and time consuming in the long run.[320] Louisiana's experiment with an integrated program will be watched with great interest.

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[319] LDEQ, Air Quality Regulations Public Hearing, Log. No. AQ70, (Aug. 25, 1993), at 6-8.

[320] *Id.* at 26.

VI. REVIEW OF SELECTED STATE TITLE V PROGRAMS

The state Title V programs reviewed below were selected because of their unique flexibility provisions. The use of different terminology and approaches can make individual state programs very confusing. Every attempt is made to explain how these state flexibility provisions correspond to the Part 70 flexibility provisions, but that is not always an easy task.

A. Texas

Texas' Title V program is one of those that varies most appreciably from the Part 70 minimum requirements.[321] Texas' flexibility provisions diverge from Part 70 in a number of ways, as do some other important elements of the Texas program. Some of the differences are very significant, while others are minor inconsistencies that may simply be the result of poor drafting. Texas uses some different terms from Part 70 and has some hybrid concepts, making its flexibility scheme both interesting and challenging to analyze.

In general, Texas' primary motivation in developing its Title V program has been to *preserve its rigorous minor* NSR program.[322] Texas believes that as long as its minor NSR program is intact to constrain sources, the amount of flexibility provided by its Title V program is not a major concern.[323] Review of Texas' Title V program shows that in different provisions, different policies have sway. Sometimes industry is favored, but just as often the main goals are adequate permitting authority review and keeping the permit up-to-date.

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[321] Texas' Title V program was submitted by the Nov. 15, 1993 deadline. The enabling legislation is found in the Texas Clean Air Act, at TEX. HEALTH & SAFETY CODE ANN. tit. 5, subchapter C, §§ 382.001 et seq. The Title V regulations are found at TEX. ADMIN. CODE tit. 30, Chapter 122 (1993). Chapter 122 is entitled Federal Operating Permits. Chapter 122 is often referred to in Texas as Regulation XII. Chapter 122 was formerly codified in TEX. ADMIN. CODE tit. 31 with the same section numbers.

[322] Letter, Steven N. Spaw, Executive Director, Texas Air Control Board, to William G. Rosenberg, Assistant Administrator, EPA Office of Air and Radiation, *Proposed Title V Permit Program*, Nov. 14, 1991, EPA Air Docket No. A-90-33, IV-C-64 (commenting on proposed rule, urging EPA to allow states to maintain their existing new source review programs). For more details about Texas' minor NSR program, *see supra* text accompanying notes 291-301.

[323] Telephone interview with Karen Olson, Manager, Operating Permits Program, Permitting Division, TNRCC, (Jun. 10, 1994).

There are some discrepancies, and as a result, there may be doubt whether the flexibility aspect of Texas' program is substantially equivalent to the federal scheme.

Texas' flexibility provisions are categorized as administrative permit amendments, permit additions, significant permit modifications, and operational flexibility changes. These provisions are all found in a subdivision of Texas' Title V rules entitled "Permit Revisions."[324] Although this subdivision includes operational flexibility changes, it expressly excepts such changes from actually being processed as permit revisions.

Section 122.210(a), "Applicability," broadly defines the types of changes which must be processed as a permit revision in Texas. It provides that except for operational flexibility changes, sources must submit an application to the Texas Air Control Board (TACB)[325] for a permit revision for "those changes or activities which affect or add one or more applicable requirements on any relevant emission unit." (emphasis added). Section 122.210(c) then provides that "all other changes or activities at the site are not subject to the requirements of this chapter." Thus, Texas sets up a generalized distinction between the types of changes that require a permit revision and those that do not, based on whether the change affects or adds an applicable requirement. This broad definition of the kinds of changes that trigger permit revision procedures is an improvement on Part 70, where no attempt is made to define what triggers a permit revision in general.[326] The preamble to EPA's proposed revisions to Part 70

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[324] TEX. ADMIN. CODE tit.30, §§ 122.210-122.213, 122.215-122.217, 122.219-122.221.

[325] On Sept. 1, 1993, the TACB merged with the Texas Water Commission to form the Texas Natural Resource Conservation Commission (TNRCC). However, many of the TACB regulations and even Texas statutes still refer to the TACB.

[326] However, Texas' "affect or add" language may not actually cover all the flexibility provisions it purports to encompass. First, administrative permit amendments, which can involve such simple changes as correction of typographical errors, do not necessarily "affect or add" applicable requirements. Second, as will be discussed further *infra*, Texas has a category of changes which it calls permit additions. Permit additions include changes that are "not addressed or prohibited" by the permit, which is the same definition used by Part 70 for off-permit changes. Yet a change which is "not addressed or prohibited" by the permit would not seem to "affect or add" an applicable requirement. Thus, § 122.210(c) would appear to exempt permit additions from being processed as permit revisions. However, it is clear from the permit addition provisions themselves that permit additions are handled as permit revisions. Thus, Texas may have inadvertently created a minor inconsistency in its rules.

recognize this deficiency by providing a general definition that the only changes requiring a permit revision are those that cannot be operated (1) without violating a permit term, or (2) rendering the source subject to a requirement to which the source has not previously been subject.[327]

In conformity with its desire to protect its minor NSR program, Texas makes it clear that all changes which are to be made under any of the flexibility provisions must first go through NSR if it is applicable. It is a prerequisite for every permit revision that the owner or operator first obtain or qualify for any preconstruction authorization required by Chapter 116.[328]

1. Administrative Permit Amendments

Texas defines administrative permit amendments in the same manner as Part 70,[329] with one potentially important deviation. Texas joins some other states in providing that any change which is similar to the four basic enumerated changes (typographical errors, minor administrative changes, more frequent monitoring or reporting, and changes in ownership) may also qualify as an administrative permit amendment.[330] Texas does not set forth a definition of these "similar" changes, nor impose any requirement that EPA pre-approve them, as required by 40 C.F.R. section 70.7(d)(1)(vi). This could give Texas unauthorized discretion to make case-by-case decisions about what sorts of changes will qualify as administrative permit amendments.[331]

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[327] Advance Text, *supra* note 12, at 39 (preamble, sec. III.E.1).

[328] TEX. ADMIN. CODE tit. 30, §§ 122.213 (b)(2) (administrative permit amendments); 122.216(b) (permit additions); 122.219(b) (significant permit modifications); 122.221(a)(3) (operational flexibility).

[329] TEX. ADMIN. CODE tit. 30, § 122.211(1)-(4); 40 C.F.R. § 70.7(d)(1)(i)-(iv).

[330] TEX. ADMIN. CODE tit. 30, § 122.211(5).

[331] In fact, EPA commented to Texas that its rule should specify the types of "similar" changes that would be allowed. However, Texas responded that its provision was identical to the language in Part 70 (which is clearly not the case). Texas rationalized its provision by arguing that it could not envision every possible change that might qualify as an administrative permit amendment, and therefore would not create a narrow definition. 18 Tex. Reg. 5989, 6002 (Sept. 7, 1993).

For instance, it is possible that Texas could use the "similar" change provision to incorporate the terms of preconstruction authorizations which have not been processed through the type of enhanced NSR program that is required by Part 70 in order to accomplish permit revision by administrative permit amendment. Although Texas has expressly chosen not to enhance its minor NSR program,[332] it seems to envision using administrative permit amendments for changes that require preconstruction authorization. In several places, Texas refers to changes that cannot be made by administrative permit amendment until the required preconstruction authorization under Chapter 116 is obtained.[333]

Another facet of Texas' administrative permit amendment rule is the timing of the change. In all cases, an application must be made.[334] Although Part 70 allows administrative permit amendment changes to be implemented immediately upon submittal of the application,[335] Texas does not allow them to be made until the source has obtained or qualified for any required preconstruction authorization.[336] This is consistent with Texas' policy of separating its Federal Operating Permit Program from its preconstruction NSR program. Changes which do not require preconstruction authorization can be implemented immediately upon submittal of the application, consistent with Part 70.[337]

Finally, Texas adds two reasonable requirements to its administrative permit amendment procedures which are not expressly found in Part 70, although they could be

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[332] Olson, *supra* note 292, at 5.

[333] TEX. ADMIN. CODE tit. 30, §§ 122.213(b)(2), (d); 122.212.

[334] TEX. ADMIN. CODE tit. 30, § 122.212; 122.213(b)(1).

[335] 40 C.F.R. § 70.7(d)(3)(iii). The term "request" is used instead of application.

[336] TEX. ADMIN. CODE tit. 30, § 122.213(d).

[337] TEX. ADMIN. CODE tit. 30, § 122.213(d). However, there is an inconsistency that may be attributable to poor drafting. In TEX. ADMIN. CODE tit. 30, § 122.212, Texas provides that if preconstruction authorization is not required, applications for administrative permit amendments shall be submitted no later than 90 days *after* the change prompting the request. However § 122.213(d) allows implementing the change immediately upon filing the application. It is difficult to reconcile these two provisions. It is not clear how an application can be submitted up to 90 days *after* the change has been made when the change is not supposed to be made in the first place until the application is submitted.

implied. One is to specify that the application should include a description of the proposed changes and a statement that it meets the administrative permit amendment criteria.[338] The other is that the source shall be subject to enforcement action if the change is later determined not to qualify as an administrative permit amendment.[339]

2. Permit Additions

One of the most significant features of Texas' flexibility provisions is a hybrid creation that it calls "permit additions." Permit additions are intended to be a combination of the types of changes authorized by Part 70 as off-permit changes and minor permit modifications.[340] The motivation for creating this combination provision was Texas' belief that the term "off-permit changes" has a poor connotation and that minor permit modifications have been extremely controversial.[341] However, some crucial differences between Texas permit additions and Part 70 have more significant consequences than a mere name change designed to reduce controversy and avoid negative impressions would imply.

Because of its uniqueness, Texas' permit addition provision is reproduced in full:

§ 122.215. Permit Additions.

(a) A change at a site may qualify as a permit addition if the change satisfies all of the requirements of either subsection (b) or subsection (c) of this section.

(b) The change at the site:

(1) is not addressed or prohibited by the federal operating permit;

(2) does not violate any existing term or condition of the federal operating permit;

(3) does not violate any applicable requirement; and

(4) is not a Title I modification, or otherwise required by the Texas Air Control Board (TACB) to be processed as a

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[338] TEX. ADMIN. CODE tit. 30, § 122.213(b)(1).

[339] TEX. ADMIN. CODE tit. 30, § 122.213(e).

[340] Olson, *supra* note 292, at 17.

[341] Olson interview, *supra* note 323.

significant modification.

(c) The change at the site:

(1) does not violate any applicable requirement;

(2) does not involve removal of monitoring, recordkeeping, or reporting terms and conditions, or a substitution in those terms and conditions promulgated pursuant to federal New Source Standards or National Emissions Standards for Hazardous Air Pollutants;

(3) does not require or change a determination of an emission limitation under the Act, §112(g) or §112(j) of Title I, or a source-specific determination for temporary sources of ambient impacts, visibility analysis, or increment analysis; and

(4) does not seek to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement, and that the site has assumed to avoid an applicable requirement to which the site would otherwise be subject. Such terms and conditions include:

(A) a federally enforceable emissions cap assumed to avoid classification as a modification under any *provision of Title I*; and

(B) an *alternative* emissions limit approved pursuant to regulations promulgated under the Act, §112)i)(5); and

(5) is not a Title I modification, or otherwise required by the TACB to be processed as a significant modification.

a. The Off-Permit Type of Permit Addition

As can be seen by the reference to changes that are "not addressed or prohibited" by the permit, the section 122.215(b) class of permit additions is derived from Part 70's off-permit change provision. The gatekeeper requirements in section 122.215(b)(2)-(4) are also the same as those in Part 70.[342] However, the main difference between Texas section 122.215(b) changes and Part 70 off-permit changes is, as the term "permit additions" indicates, that section 122.215(b) changes are being added to the permit.

This difference is not as significant as it otherwise might be because the permit

[342] 40 C.F.R. § 70.4(b)(14) and (15).

addition is being added to the state-only portion of the permit. Texas provides that until it is final, a permit addition shall be a state-only requirement of the federal operating permit.[343] A permit addition seems to become final "at renewal of the permit."[344] If a permit addition remains state-only until renewal of the permit, that is permissible under Part 70.[345] However, there is reason to wonder the "state-only until final" characterization will accurately reflect Texas practice.

The problem is that Texas could use its permit addition procedure to add to the state-only portion of the permit changes that require preconstruction authorization (minor NSR changes). However, minor NSR changes in Texas are considered to be federally enforceable because the preconstruction review program is approved into the SIP. Thus, minor NSR changes would not really qualify as state-only terms and conditions of the Texas Title V permit. In contravention of Part 70, Texas might therefore be able to use permit additions to add federally enforceable off-permit minor NSR changes to the permit.

Requiring a permit revision for what would otherwise be off-permit changes is certainly permissible, but proper procedure must be used to add the changes to the permit. A state cannot add off-permit changes to the federally enforceable portion of a Title V permit through an administrative permit amendment. At the very least, it must use minor permit modification procedure. Thus, if Texas intended to use permit additions to add minor NSR changes, the question would be whether Texas' permit addition procedure is substantially equivalent to Part 70 minor permit modification procedure. That inquiry will be conducted later, because much of it is also relevant to the other class of section 122.215 changes.

Why has Texas chosen to add off-permit changes to the permit (even if only the state-only portion)? Although this approach erodes the primary advantage of off-permit changes

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[343] TEX. ADMIN. CODE tit. 30, § 122.217(e).

[344] TEX. ADMIN. CODE tit. 30, § 122.217(d). "The permit addition shall not become final until after EPA's 45-day review period at renewal of the permit or until EPA has notified the TACB that EPA will not object to issuance of the permit."

[345] 57 Fed. Reg. at 32,270.

for industry, which is that they can be made without a permit revision, it benefits the TACB and enforcement efforts by helping maintain the permit as an up-to-date inventory or record of all emission unit activities.[346] In addition, even though a source must comply with procedures equivalent to minor permit modification procedures in order to make a change that requires a permit addition, Texas does not consider those procedures to be onerous.[347]

b. Minor Permit Modification Type of Permit Additions

Section 122.215(c) is patterned after the Part 70 minor permit modification criteria.[348] While most of the gatekeepers in subsections (c)(1)-(5) track Part 70's gatekeepers, there is one important difference. The differences between subsection (c)(3) and its Part 70 equivalent,[349] are highlighted below:

> (c)(3) [Does] not require or change a ~~case-by-case~~ determination of an emission limitation ~~or other standard~~ under the Act, §112(g) or §112(j) of Title I, or a source-specific determination for temporary sources of ambient impacts, or a visibility or increment analysis.

As can be seen, subsection (c)(3) omits the words "case-by-case" and "or other standard" and adds "under the Act, §112(g) or §112(j) of Title I." These alterations have the effect of making the subsection (c)(3) gatekeeper less restrictive than its Part 70 equivalent. In other words, subsection (c)(3) would allow certain changes to be processed as permit additions that Part 70 would forbid. Subsection (c)(3) would allow a change to qualify as a permit addition as long as it did not require or change an emission limitation determination under CAA sections 112(g) or 112(j) (and satisfied all the other gatekeepers). In contrast, Part 70 would not allow the same change to qualify for a minor modification if it required or changed *any* case-by-case determination of an emission limitation or other standard.

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[346] "[A] State may have an interest in maintaining a permit as a comprehensive statement of the source's air pollution control obligation. The proposed regulations allow a State to do this. If it wants to take this approach, it would be the option of the permitting authority to identify and attach to the part 70 permit those provisions which are to be enforced by the State but not EPA." 56 Fed. Reg. at 21,730.

[347] Telephone interview with Karen Olson, *supra* note 323.

[348] 40 C.F.R. § 70.7(e)(2)(i)(A).

[349] 40 C.F.R. § 70.7(e)(2)(i)(A)(3).

The term "case-by-case determination" refers to establishing emission limitations or other air pollution control requirements on an individual basis for a particular source, as opposed to establishing requirements for categories of sources. The preamble to the Part 70 final rule gives the following examples of case-by-case determinations which cannot be processed as minor permit modifications: "case-by-case MACT determination[s] under section 112(g) of the Act, or equivalency determinations for RACT limits under title I...."[350]

Although subsection (c)(3) would prevent using permit additions for changes that require or change a section 112(g) case-by-case MACT determination (as well as a section 112(j) MACT equivalency determination), it would not prevent using permit additions for other case-by-case determinations, such as a RACT equivalency determination or a minor NSR BACT determination. In Texas, BACT is mandated for all new construction and modifications under the existing state NSR program, not just for major emitting facilities.[351]

EPA Region VI pointed out the potential problems with subsection (c)(3):

> EPA commented that §122.215(5) [now subsection (c)(3)] would allow, under permit additions, changes which involved reasonably available control technology, PSD, BACT, lowest achievable emission rate, § 111, *or any* case-by-case determination, with the exception of §112(g) or §112(j) determinations.[352]

However, Texas simply responded to the EPA comment by saying that its proposed rule was consistent with the intent of Congress, Part 70, and EPA comments at workshops,[353] and did not change the rule other than to revise the word order and renumber the section. This deficiency in the permit addition criteria could be a significant problem with the Texas program because it allows changes which involve certain case-by-case determinations to be

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[350] 57 Fed. Reg. at 32,287.

[351] TEX. ADMIN. CODE tit. 30, § 116.111(3).

[352] 18 Tex. Reg. at 6002. All of the acronyms listed involve case-by-case determinations.

[353] *Id.*

made under minor permit modification procedure when Part 70 would not allow that.[354]

c. Permit Addition Procedures

In order to provide adequate, streamlined and reasonable procedures for processing permit revisions, Texas asserts that it has chosen to adopt procedures for permit additions that are substantially equivalent to those relating to Part 70 minor permit modifications.[355] Texas declares that the procedural requirements for its permit additions provide for the same or greater level of permitting authority, EPA, and affected state review, as well as the same public participation, as Part 70 minor permit modification procedures.[356] Texas' permit addition procedures are indeed similar to the Part 70 minor permit modification procedures, but there are some key deviations and potential problems due to some ambiguous language.

The permit addition procedures[357] begin by requiring the source to submit an application to the TACB that includes a description of the change and resulting emissions, the permittee's suggested draft permit conditions, and a certification by a responsible official

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[354] It may be worth briefly mentioning two other differences between § 122.215 and the part 70 minor permit modification criteria. The first is that Texas omits a provision corresponding to 40 C.F.R. § 70.7(e)(2)(B), which states that notwithstanding the other criteria, minor permit modification procedures may be used for permit modifications involving the use of economic incentives, marketable permits, emissions trading, and other similar approaches, to the extent that such procedures are provided for in a SIP or applicable requirement. 57 Fed. Reg. at 32,287. Most states that omit this provision do not have programs that would be covered by it.

Second, § 122.215(c)(2) prohibits using permit additions for changes that involve the "removal" of monitoring, recordkeeping, or reporting terms and conditions, or a "substitution" in those terms and conditions promulgated pursuant to federal NSPS or NESHAPs. Part 70, on the other hand, only prohibits using minor modification procedures for *significant* changes to existing monitoring, reporting, or recordkeeping requirements. Again, whether this difference is of any consequence is unclear; it would be almost too clever to argue that a significant change to a monitoring term could be processed through a permit addition because it did not constitute a total elimination (removal) of the term.

[355] Olson, *supra* note 292, at 17; Texas Title V Program, Program Overview, at 6. ("permit additions ... are substantially equivalent to the minor permit modification procedures in part 70).

[356] Olson, *supra* note 292, at 18.

[357] TEX. ADMIN. CODE tit. 30, §§ 122.216; 122.217.

that the proposed change meets the criteria for the use of permit addition procedures.[358]

After the application, the TACB must notify the EPA and any affected states of the requested permit addition. Within 90 days of receipt of the application,[359] the TACB must determine whether the change meets the permit addition criteria and should be reviewed as a significant permit modification, or must revise the draft permit addition and transmit it to EPA. Alternatively, the TACB may *issue* a permit addition for those changes that qualify. The source may make the requested change prior to *approval* of the permit addition provided that it has obtained or qualified for any required NSR authorization. The permit addition does not become *final* until after EPA's 45-day review period "at renewal of the permit" or until EPA has notified the TACB that EPA will not object to issuance of the permit addition, whichever is first. Until final, the permit addition is a state-only requirement of the federal operating permit.[360]

One of the troublesome aspects of this procedure is the provision suggesting that final action on a permit addition request will not be taken until the permit is renewed:

> The permit addition shall not become final until after EPA's 45-day review period *at renewal of the permit* or until EPA has notified the TACB that EPA will not object to issuance of the permit addition, whichever comes first.[361] (emphasis added).

It is not clear whether this means that the permit addition shall not become final until renewal of the permit, or that it shall not become final until after EPA's 45-day review period (which review period will be at renewal of the permit). In either event, there could be a problem because permit renewal may not occur for up to five years, depending on when the change

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[358] Of course, under Part 70 no application need be submitted for an off-permit change since no permit revision is contemplated.

[359] Or subsequent to the source obtaining or qualifying for any minor NSR permit, whichever is later.

[360] The emphasis was added to the words issue, approval, and final because as will be seen, they cause confusion over what happens to a permit addition application.

[361] TEX. ADMIN. CODE tit. 30 § 122.217(d).

occurs during the life of a five year permit.[362] Postponing EPA's review until renewal could give a source a windfall period when it could operate after making the change without effective review. Postponing TACB's final action until renewal would stretch the time for a permit revision to occur well beyond the 90 days allowed by Part 70.

The timetable in Part 70 for final action by the permitting authority on a minor permit modification is 90 days from receipt of the application or 15 days after EPA's 45-day review period, whichever is later.[363] It is true that Texas provides that the TACB shall, within 90 days of receipt of an application for a permit addition, take action to determine that the requested change does not meet permit addition criteria or revise the draft permit addition and transmit it to EPA.[364] It is also true that Texas' rule says that the TACB may "issue" a permit addition, although it does not specify when. Further, the same rule speaks of the source making the requested change prior to "approval" of the permit addition, but again, when approval occurs is not specified.[365]

However, one thing is clear under Part 70 - the permitting authority cannot take final action until after EPA's review. Under the Texas rule, if EPA review does not occur within 90 days (i.e., if it occurs at renewal), Texas could not comply with the requirement to take final action by the 90 day mark.[366] On the other hand, if EPA review occurs right after application, but final action does not occur until permit renewal, Texas will similarly be outside the 90 day requirement.

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[362] Title V permit terms in Texas are not to exceed five years. TEX. ADMIN. CODE tit. 30, § 122.210(b).

[363] 40 C.F.R. § 70.7(e)(2)(iv).

[364] TEX. ADMIN. CODE tit. 30, § 122.217(b).

[365] TEX. ADMIN. CODE tit. 30, § 122.217(c). Approval is not the same as final action under the federal rule. Under 40 C.F.R. § 70.7(e)(2)(iv), the permitting authority can approve a minor permit modification prior to EPA's review, but final action must wait until after EPA's review (or notification that EPA will not object).

[366] It is not seriously expected that Texas would delay submitting a permit addition application to EPA for review until permit renewal, but the discussion illustrates the confusing nature of this component of the rule.

There is another reason why, at the very least, the insertion of the words "at renewal of the permit" make Texas' permit addition procedure quite confusing. Texas has said that until it is final, a p addition will be a state-only requirement of the federal operating permit.[367] Again, if a permit addition is not final until permit renewal, it may take years for it to become final. During that time, a source may have less reason to fear enforcement. If Texas really intends that a permit addition not be federally enforceable for several years, there would be a conflict with Texas' section 122.217(f), which conforms to Part 70's minor permit modification procedures in providing that until a permit addition is final, the source shall comply with the proposed permit terms and conditions, and if it fails to do so, the existing permit terms and conditions shall be (fe enforceable against it.[368] It would seem that if permit additions are federally enforceable pe ig final action, they can hardly be state-only requirements.

Another issue is whether Texas requires the TACB to respond to comments from affected states on permit addition applications. Part 70 requires that the permitting authority notify EPA and any affected state in writing of any refusal by the permitting authority to accept all recommendations that the affected state submitted.[369] Texas does not address this requirement.

Additionally, Texas omits a requirement that any permit addition assure compliance with all applicable requirements. Part 70 provides that a permit modification may be issued only if the conditions of the modification provide for compliance with all applicable requirements and the requirements of Part 70.[370] Although Texas provides that either class

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[367] TEX. ADMIN. CODE tit. 30, § 122.217(e).

[368] Although the Texas rule does not use the term "federally," federal enforceability is the purpose of this provision. 40 C.F.R. § 70.7(e)(2)(v). Of course, TEX. ADMIN. CODE tit. 30, § 122.217(f) would only apply to the minor permit modification types of permit additions, since the other types (§ 122.215(b) changes) would not involve the modification of any existing permit terms that could be enforced.

[369] 40 C.F.R. § 70.7(a)(1)(iii); 40 C.F.R. § 70.8(b)(2).

[370] 40 C.F.R. § 70.7(a)(1)(iv). Although the term "permit" is used in subsection (a)(1)(iv) instead of permit modification, the introductory comment in subsection (a)(1)

of permit addition must not violate any applicable requirement, that is not the same as requiring the permit revision to provide for compliance with all applicable requirements.

Yet another complication is that Texas is not entirely clear on when the source can make the change underlying a permit addition. Under Part 70, off-permit changes can be made as soon as contemporaneous notice is provided, and changes requiring minor permit modifications can be made immediately after the application is filed. However, Texas provides only that the source may make the change "prior to approval" of the permit addition, if it has also obtained any required preconstruction authorization.[371] While "prior to approval" may include making the change immediately after obtaining any required preconstruction authorization, that is not clearly stated.[372]

Consistent with its position regarding its minor NSR program, Texas did reject more extensive review for permit additions than required by Part 70. In response to a comment that the permit addition procedures should be rewritten to allow a 30-day public comment period, Texas said:

> [T]he changes which qualify as permit additions are either minor changes at the site, and as such should not require public comment, or involve operational changes which will require review under Regulation VI [preconstruction review] and a subsequent determination under that chapter as to whether public notice is appropriate for the change at the site.[373]

In summary, whether Texas' permit addition provisions substantially meet Part 70 requirements is debatable. Because of the overly broad section 122.215(c) criteria which allow certain case-by-case determinations to be processed as permit additions, and the possibility that some federally enforceable permit terms will be added to the state-only portion of the permit under section 122.215(b), Texas may need to make further changes to its

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makes it clear that permits, permit modifications, and renewals are covered by all the conditions in subsection (a)(1)(i)-(v).

[371] TEX. ADMIN. CODE tit. 30, § 122.217(c).

[372] With administrative permit amendments, Texas clearly stated the change could be made immediately upon receipt of the preconstruction authorization, or if none was needed, immediately upon filing the application.

[373] 18 Tex. Reg. at 6002.

program to conform to Part 70.

3. Operational Flexibility

Texas does not expressly provide for two required types of operational flexibility - alternative operating scenarios and emissions trading under a cap - although it contends they are implicitly allowed. Texas has one provision, section 122.221, which addresses operational flexibility. Section 122.221 corresponds most closely to Part 70's section 502(b)(10) changes, but fails to conform to Part 70 in several crucial respects.

Section 122.221 provides, in pertinent part:

> (a) A permittee may make changes within a permitted site without applying for or obtaining a permit revision provided that the following conditions are met:
>
> (1) the changes are not Title I modifications;
>
> (2) the changes do not exceed the emissions limitation under the permit; and
>
> (3) the owner or operator has obtained or qualified for any [required] preconstruction authorization....[374]

As can be seen, subsections (1) and (2) come directly from CAA section 502(b)(10), although subsection (2) leaves off the qualifier "whether expressed therein as a rate of emissions or in terms of total emissions."

However, section 122.221 lacks the Part 70 elaborations on section 502(b)(10) changes. In Part 70, EPA interpreted section 502(b)(10) changes to mean changes that contravene an express permit term.[375] EPA further narrowed the scope of section 502(b)(10) changes by prohibiting any changes that would violate applicable requirements or contravene federally enforceable monitoring, recordkeeping, reporting, or compliance certification requirements.[376] Texas does not include these crucial additional restrictions, and does not even limit section 122.221 changes to those that contravene an express permit term.

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[374] TEX. ADMIN. CODE tit. 30, § 122.221(a).

[375] 40 C.F.R. § 70.2.

[376] *Id.*

For example, section 122.221 might not prevent operational flexibility from being used to make changes which would violate applicable requirements. The only limitations Texas applies are that the change cannot be a Title I modification or exceed the emissions allowable under the permit. There does not appear to be anything in the rest of Texas' Title V rules that would prevent a change from being made under the operational flexibility provision if it would violate an applicable requirement. In contrast, Texas clearly prohibits changes from being made as permit additions that would violate any applicable requirement.[377] Obviously, Texas' operational flexibility provision is untenable if it can be applied in such a manner that changes would be allowed to violate applicable requirements.

EPA did request that Texas add language incorporating the Part 70 definition of section 502(b)(10) changes. Texas' response was that it had attempted to present the requirements of the federal operating permit program as clearly as possible, and that "[f]or this reason, the staff chose in the proposed rule to clearly define the changes allowed under §502(b)(10) rather than reference the federal section or terminology."[378] However, Texas' response does not explain why its version of section 502(b)(10) changes is so much broader than Part 70's.

There are some other differences between section 122.221 and Part 70. One is that section 122.221 only provides for one of the two types of operational flexibility required by section 70.4(b)(12). Section 122.221 provides for section 502(b)(10) changes, but does not provide for emissions trading requested by the source to comply with an emissions cap in the permit. Moreover, section 122.221 does not provide for reasonably anticipated operating scenarios. Although many states keep their provisions for operational flexibility and alternate operating scenarios separate, as does Part 70 (because alternate scenarios do not find their legal basis in CAA section 502(b)(10)), there are no requirements for alternate operating scenarios anywhere in Texas' Title V rules.

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[377] TEX. ADMIN. CODE tit. 30, § 122.215(b)(3), (c)(1).

[378] 18 Tex. Reg. at 6003.

Texas recognizes that its program does not explicitly specify emissions trading and alternate operating scenarios. It contends that these methods of obtaining operational flexibility are "implicitly allowed by the operating permit design."[379] More specifically, in response to several comments on this issue, Texas said:

> The staff recognizes that both emissions trading and alternate operating scenarios were included in 40 CFR 70. The staff designed the proposed operating permit program (permit content and scope) to allow such changes provided that such changes do not affect an applicable requirement, and provided that Regulation VI [Chapter 116] and the Texas State Implementation Plan (SIP) allows such emission trading and alternate operating scenarios. Regulation VI does not allow for a facility to "trade emissions" without best available control technology (BACT) and an emissions impact review. Nor does Regulation VI allow a source to vary its operating scenario, unless expressly allowed under an existing preconstruction authorization. The staff believes that both emissions trading and alternate operating scenarios are appropriately addressed under the current Regulation VI New Source Review (NSR) program.[380]

Despite this explanation, it is hard to see from the permit content sections of Texas' Title V regulations how emissions trading and alternate operating scenarios are implicitly allowed.[381] It also appears that Texas' response is referring to emissions trading under the SIP rather than emissions trading requested by the source to comply with a federally enforceable cap in the permit (the mandatory type of emissions trading). Additionally, there is the question whether a state can prevent a Part 70 source from including alternate operating scenarios in its Title V permit because they are not allowed by the state's NSR program. While a state can generally impose more stringent requirements than Title V and Part 70, in the area of flexibility, states must give sources at least as much flexibility as Part 70 does. Thus, Texas' approach to alternative operating scenarios may be problematic.

Although Texas' version of section 502(b)(10) changes would substantively be much broader than Part 70, as noted above, Texas is procedurally more restrictive. Texas requires 30 days advance notice before the change can be made, whereas CAA section 502(b)(10) and

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[379] Olson, *supra* note 292, at 19.

[380] 18 Tex. Reg. at 5989-90.

[381] *See* TEX. ADMIN. CODE tit. 30, §§ 122.141, 122.143, 122.145.

Part 70 only require seven days notice. Section 122.221(b) provides that:

> The written notification shall be received by the TACB at least 30 days in advance of operation of the proposed changes unless the Board or its designee approves a shorter period, but in no case shall that period be less than seven days prior to the proposed change.[382] (emphasis added).

Although the advance notice period in Texas is normally 30 days, it appears that it is possible for a source to obtain a shorter period, on a case-by-case basis.

During comment, industry argued that 30 days notice would cause unacceptable delay and the period should be shortened to seven days. Industry said that the TACB should be able to react promptly to these notifications. Texas responded that:

> To at least partially address those concerns, the staff has revised §122.221(b) to allow the proposed operational changes at the expiration of the notification period, rather than allowing the permittee to make the proposed change, i.e., begin construction, at that time. The staff will have sufficient time to review the written notification for applicability under this section, and the permittee will have the additional latitude to make physical changes at the site as necessary while waiting for the expiration of the notification period.[383]

Obviously, Texas' primary concern is having enough time to review the change. To implement the above response, Texas inserted the words "of operation" in section 122.221(b). It also changed section 122.221(f) to read: "Upon satisfying the requirements of this section, the permittee may begin operations which result from the proposed change at the expiration of the time period provided for in subsection (b) of this section." (emphasis added showing the revision).

It does not appear that Part 70 addresses the distinction between construction and operational changes that Texas makes in connection with operational flexibility. One likely reason is that the federal rule only requires seven days advance notice, so delay is not as great an issue for industry. Moreover, it may be considered implicit in the structure of Title V that a distinction between construction and operational changes is permissible because Title V is purely an operating permit program.

One other note about Texas' operational flexibility scheme is that it requires the 30 day

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[382] TEX. ADMIN. CODE tit. 30, § 122.221(b).

[383] 18 Tex. Reg. at 6003.

notification to include certification by a responsible official that the change meets the criteria for use of operational flexibility.[384] Such a certification is not required under Part 70. Considering the lack of specificity in Texas' operational flexibility criteria, responsible officials may be somewhat wary of having to make certifications. However, neither Part 70 nor Texas discusses enforcement in connection with a mistakenly defective certification of an operational flexibility change.[385]

4. Significant Permit Modifications

There is an intriguing issue about whether there is any problem with Texas' significant permit modification provision, section 122.219. Although the answer is unclear, working through this question will at least give one a better insight into how Part 70 operates. The issue arises because of an EPA comment on Texas' rule:

> EPA commented that §122.219 does not require a permittee with a change qualifying as a significant permit modification to revise the permit prior to commencing operation of the equipment subject to the modification. The staff finds no such requirement in 40 CFR 70. The staff believes that the only prohibition on operation in the federal rule is in the case where a change is a Title I modification and the change is also prohibited by the existing permit terms and conditions.[386]

More specifically, it appears that EPA has been concerned that section 122.219 would allow sources up to 12 months after the change occurs to apply for a significant permit modification, at least for changes that are not Title I modifications, even if the change is prohibited by the existing Title V permit.

To analyze this issue, we must first look at Texas' significant permit modification scheme. Section 122.119 provides, in pertinent part:

> (b) Applications for changes that qualify under this section shall be submitted by the permittee no later than 12 months after the owner or operator has obtained or qualified for any preconstruction authorization required by Chapter 116....

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[384] TEX. ADMIN. CODE tit. 30, § 122.221(c)(2).

[385] 40 C.F.R. § 70.11, Requirements for Enforcement Authority. A knowingly false certification is a criminal offense, however.

[386] 18 Tex. Reg. at 6002.

> (c) For changes that qualify as Title I modifications and where the existing federal operating permit prohibits such change, the permittee shall obtain the significant permit modification before commencing any operation.
>
> (d) Except as required in subsection (c) of this section, those changes that qualify as significant permit modifications may commence operation of any corresponding change immediately after obtaining or qualifying for any preconstruction authorization required under Chapter 116....

In subsections (b) - (d), Texas is relying primarily on 40 C.F.R. section 70.5(a)(1)(ii), discussed earlier in connection with integrated programs.[387] As noted, 40 C.F.R. section 70.5(a)(1)(ii) does allow a source that has obtained a construction permit through major NSR for a modification to commence operation of the change without first obtaining a permit revision, unless prohibited from doing so by the permit. This rule would apply even when the permit revision required is a significant permit modification, because 40 C.F.R. section 70.5(a)(1)(ii) does not make a distinction between types of permit revisions.

Therefore, section 122.219 can allow sources that have obtained preconstruction authorizations under a program approved into the SIP under part C or D of Title I (in effect, major NSR) to wait 12 months after operation of the change to apply for a significant permit modification. But does section 122.219 go further than that?

Subsection (d) allows changes that qualify as significant permit modifications to commence operation after obtaining any required preconstruction authorization, except as provided in subsection (c). Setting aside the exception for the moment, subsection (d) in conjunction with subsection (b) seems to allow changes that have been through preconstruction review to operate immediately and apply for the permit revision up to 12 months later. But is this really the equivalent of 40 C.F.R. section 70.5(a)(1)(ii)?

Because of the reference to parts C or D of Title I, the preconstruction review envisioned by 40 C.F.R. section 70.5(a)(1)(ii) is major NSR. However, the preconstruction review required under Texas' Chapter 116 could include minor NSR. Thus, at first glance, one would think that section 122.219(d) may be too broad in allowing minor NSR changes

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[387] *See supra* note 298 and accompanying text.

to be operated without obtaining a permit revision. However, the question then becomes whether any minor NSR changes would ever require processing as a significant permit modification. The answer to this depends on the interpretation of Title I modification. If a minor NSR change is a Title I modification, then it could not be made using a permit addition (Texas' version of minor permit modifications, which cannot be used for Title I modifications). If a minor NSR change could not be processed as a permit addition or administrative amendment, it would have to be processed as a significant permit modification.[388] In that case, section 122.219 would indeed be broader than 40 C.F.R. section 70.5(a)(1)(ii) would allow. On the other hand, if a minor NSR change is not a Title I modification, then it could be processed as a permit addition, and section 122.219 would not be brought into play.

Turning to bsection (c), this provision prevents a source from waiting to make a significant permit modification where the change is a Title I modification and is prohibited by the permit. Is this the equivalent of 40 C.F.R. section 70.5(a)(1)(ii)? Although 40 C.F.R. section 70.5(a)(1)(ii) does not allow the 12 month permit revision application delay for changes prohibited by the permit, it does not specify that the changes prohibited by the permit must be Title I modifications, as does Texas. Nevertheless, the meaning seems to be the same, since the only changes covered by 40 C.F.R. section 70.5(a)(1)(ii) are, in effect, Title I modifications.

However, there may be a concern that subsection (c) could be read to allow changes that are not Title I modifications but are prohibited by the permit to begin operation before obtaining a significant permit modification. Other than minor NSR changes discussed above, it is difficult to think of an example of a change that would require significant permit modification processing and not be a Title I modification. One possible example might be a change to monitoring or compliance terms. Such a change would require processing as a

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[388] TEX. ADMIN. CODE tit. 30, § 122.219(a)(2): changes may qualify as a significant permit modification if they do not qualify for permit additions, administrative amendments, or for operational flexibility.

significant permit modification under section 122.219(a)(3). It would clearly not be a Title I modification. A source might argue that it could make such a change under authority of subsection (c) without first obtaining a permit revision. The source would argue that subsection (c) was inapplicable since the change is not a Title I modification. The source might even then claim that since no preconstruction authorization is required, it could commence operation under subsection (d) and wait 12 months to apply for a significant permit modification under subsection (b).

While this reasoning may seem convoluted, Texas could have avoided such a problem by simply not adding the words "Title I modification" in subsection (c). Then any change which was prohibited by permit terms could not begin operation before obtaining a permit revision. Texas may counterargue that changes to monitoring or compliance terms cannot use the 12 month delay rule because they do not require preconstruction authorization. However, subsection (c) could be read not to require that a change undergo preconstruction review, but simply that it obtain such review if necessary.

Under Texas' rule, there could be some cases during which the change requiring a significant permit modification would be in effect before it underwent the necessary full-fledged review. Since the review required for a significant permit modification is the same as for original permit issuance (with the exception that it is limited to the scope of the modification), the source could receive a substantial benefit by avoiding that review for up to 12 months after making the change.[389] In comparison, Texas permit addition applications must be submitted within 90 days after obtaining any required preconstruction authorization. A source might very well want to classify a change as a significant permit modification instead

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[389] Texas' review procedure for significant permit modifications requires that: a complete application be submitted, public participation requirements be met, affected state notification requirements be met, the conditions of the permit provide for compliance with all applicable requirements, and EPA receive a copy of the permit and not object to issuance within the time specified. TEX. ADMIN. CODE tit. 30, § 122.220, Significant Permit Modification Application and Procedures. This procedure corresponds to the Part 70 prescribed requirements for action on applications for a permit, permit modification, or renewal.

of a permit addition to obtain more time to apply and to postpone review. At the very least, Texas may want to clarify section 122.219 to prevent this.

This examination of Texas' significant permit modification provision illustrates that there are two key questions that must be answered separately when dealing with a situation where 40 C.F.R. section 70.5(a)(1)(ii) may be applicable in a permit revision context. The first is whether the change is prohibited by the existing permit. If the answer is yes, then the permit must be revised before the change can be implemented. In that case, the second question is whether the change requires processing as a minor permit modification or a significant permit modification. On the other hand, if the change is not prohibited by the existing permit, and otherwise meets the requirements of 40 C.F.R. section 70.5(a)(1)(ii), it may be operated immediately, and the source may wait 12 months to apply for the appropriate permit revision. In that case, the source is in effect operating off-permit during that period.

One final point is that Texas allows the application shield for significant permit modifications.[390] But Part 70 does not provide an application shield for permit revisions because it makes no sense in the context of permit revisions. 40 C.F.R. section 70.5(a)(1)(ii)'s 12 month application delay rule is not the equivalent of an application shield. As just discussed, it is more properly viewed as an authorization to operate off-permit. The application shield only exists to protect sources that have filed a timely and complete application by allowing them to operate without a permit until it is issued.[391]

5. Interpretations of Applicable Requirements

Finally, there is another part of Texas' Title V permit rules that may prove to be a problem for the flexibility provisions, as well as other aspects of the program. Under section 122.145, Permit Content Requirements, subsection (e), Texas gives the TACB broad discretion, at the request of the source, to "establish certain interpretations of specific language and definition of specific terms in an applicable requirement...for the purpose of

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[390] TEX. ADMIN. CODE tit. 30, § 122.138.

[391] CAA § 503(d), 42 U.S.C § 7661b(d); 40 C.F.R. § 70.7(b); 57 Fed. Reg. at 32,275.

determining compliance with the specific applicable requirement." Within 90 days of notice of a changed interpretation by TACB, the source must apply for "the appropriate permit revision to reflect the new interpretation of the applicable requirement."

Texas states that section 122.145(e) is intended as a substitute for the permit shield. Texas does not explicitly provide for the Part 70 permit shield. Instead, section 122.145(e) provides for establishing the agency's interpretation of a specific applicable requirement in the permit itself to provide certainty for the permit holder.[392]

However, Part 70 does not grant such discretionary power to the state air agency. This provision is unique among the state programs submitted. It gives the TACB extremely broad discretion. Under section 122.145(e), it is possible that a new interpretation of an applicable requirement could be placed in the permit via a permit revision mechanism without any previously approved SIP revision authorizing the change. Moreover, there is no time limit for incorporating such a new interpretation in the permit, which could allow a source to operate under a different interpretation than expressed in the permit.

6. Summary

Some of Texas' deviations from Part 70 procedures for permit revisions are serious, such as the overly broad version of section 502(b)(10) changes. Others, such as the variations in permit addition procedures (for the minor permit modification class of permit additions), are also a legitimate concern. These provisions would in many cases give industry more flexibility, and the TACB more discretion, than Part 70 would allow. EPA would probably be justified in finding that Texas' flexibility provisions are not substantially equivalent to Part 70. It is more likely, though, that EPA will give Texas interim approval and require corrections where needed.

Even apart from the issue of substantial equivalency, this review demonstrates the very confusing nature of many of Texas' flexibility provisions. Even if these provisions are approved, they may be difficult for sources to understand and apply. Texas' program is a

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[392] Olson, *supra* note 292, at 5; 18 Tex. Reg. at 5992-93.

good example of how attempts to develop creative approaches, such as the hybrid permit addition, can easily run afoul of the complicated Part 70 structure.

B. Wisconsin

Wisconsin is a state that has not utilized all the flexibility options that the Part 70 rules provide. In some instances, Wisconsin's "operation permit" program imposes stricter requirements than Part 70 would demand. Wisconsin's approach can be characterized as moderately conservative. In all respects other than the ones noted below, Wisconsin's flexibility provisions conform to Part 70.[393]

1. Minor Revisions

Minor revisions are Wisconsin's version of minor permit modifications.[394] Wisconsin requires more extensive review for minor revisions than Part 70 would demand. While Part 70 does not require public notice and comment, Wisconsin does require some public review. And while Part 70 limits governmental review to the permitting authority, EPA, and affected states, Wisconsin has broader requirements. Wisconsin requires that its Department of Natural Resources (DNR) provide notice of a request for a minor revision to interested citizens and groups, as well as certain governmental units in addition to EPA and affected states. Then, all noticed parties are given 30 days to comment.

Wisconsin's Title V regulations establish the following procedure for minor revisions:

> Except as provided in § NR 407.16 [Revision Procedures for Non-Part 70 Source Permits and State-Only Requirements for Part 70 Sources], within 5 working days of receipt of a complete request for a minor permit revision, the department shall notify EPA, affected states, and those listed in § 144.3925(3)(b)2 to 5, Stats., of the request for minor permit revision. The department shall then accept comments on the proposed revision for 30 days, commencing on the date that notice is given.[395] (emphasis added).

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[393] Wisconsin's Title V program is dated Jan. 19, 1993, and was received by EPA Region V on Jan. 27, 1994. Wisconsin's enabling legislation is found at WIS. STAT. §§ 144.30 - 144.426 (1991). Wisconsin's Title V regulations are found at WIS. ADMIN. CODE ch. NR 407 (Operation Permits) (Jan. 1, 1994).

[394] WIS. ADMIN. CODE § NR 407.12.

[395] § NR 407.12 (4)(a).

The referenced statute[396] is entitled "Operation permit; application, review and effect." The referenced subsections require that notice be provided to:

> 2. Any local air pollution control agency that has a program under § 144.41 [air pollution control programs] that is approved by the department and that has jurisdiction over the area in which the stationary source is located.
>
> 3. Any regional planning agency, any county planning agency and any public library located in the area that may be affected by emissions from the stationary source.
>
> 4. Any person or group that requests the notice. [and]
>
> 5. Any city, village, town, or county that has jurisdiction over the area in which the stationary source is located.[397] (emphasis added).

In Wisconsin, the only difference between the notice required for minor revisi d that required for original permit issuance is that minor revisions do not require public notice in a newspaper of general circulation. Otherwise, all interested parties who receive original draft permit notice under Part 70 and Wisconsin law must be notified when there is a minor revision.

Even though newspaper notice is not required, Wisconsin's procedure is likely to generate broad public comment when merited. Any person or group can ask to be on the mailing list for minor revision notices. These persons or groups can then publicize the revision if they consider it controversial, drawing broader comment. Even without further publicity, as a practical matter, persons or groups on the mailing list are likely to be those members of the public most interested in commenting.

The Part 70 minor permit modification process was created to enable sources to avoid public comment in order to reduce delay in changing operations. Although Wisconsin's minor revision process will allow public comment, it will not necessarily cause delay in permitting authority action or impede the goals of the minor permit modification procedure. Under Part 70, EPA has 45 days to review minor permit modifications. The permitting authority may not

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[396] WIS. STAT. § 144.3925.

[397] WIS. STAT. § 144.3925(3)(b)2-5.

act on the modification request before the end of that period, unless EPA has provided notice that it will not object.[398] Wisconsin mirrors the Part 70 timetable in this regard.[399] In most cases, due to lack of resources, EPA will be unlikely to provide notice of non-objection before the end of its 45-day review period.[400] Therefore, since any comments on a minor revision would be submitted by the 30-day mark, Wisconsin would normally have sufficient time to review them before it could act.

Part 70 further requires that the state take final action on a minor permit modification within 90 days of receipt of the request or 15 days after the end of EPA's 45 day review period, whichever is later.[401] The final action may consist of issuing the modification, denying it, determining that it should be treated as a significant modification, or revising it and retransmitting it to EPA. If extensive comments raising important issues are submitted, they might delay Wisconsin's ability to act on a minor revision within the time allotted. However, even then the state would still seem to have ample time to act (it would have 60 days: 90 days minus the 30 day comment period).

Wisconsin has not addressed whether the DNR must respond to comments submitted on a minor revision. In conformity with Part 70, Wisconsin's minor revisions provision requires that if an affected state has submitted comments and the DNR has not accepted those comments, it shall notify that state and EPA in writing of its decision not to accept the comments and the reasons for that decision.[402] However, the statute and regulation are silent regarding the necessity for responses to comments by other noticed parties.

Despite the procedural requirement for broader notice and comment, Wisconsin's minor revisions provision is not substantively more restrictive than Part 70. The permittee

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[398] 40 C.F.R. § 70.7(e)(2)(iv).

[399] WIS. ADMIN. CODE § NR 407.12(4)(b).

[400] In addition, as previously noted, EPA does not intend to micro-manage state programs.

[401] 40 C.F.R. § 70.7(e)(2)(iv).

[402] 40 C.F.R. § 70.8(b)(2); WIS. ADMIN. CODE § NR 407.12(4)(a).

is allowed to make the change proposed in its request for a minor revision immediately after filing it with the DNR (subject to the Part 70 caveat that if the DNR determines that the change cannot be made as a minor revision, the source is liable for any violations of existing permit conditions).[403] In addition, the changes eligible for minor permit modifications are the same in Wisconsin as under Part 70 (changes which are not Title I modifications, do not violate any applicable requirement, etc.)[404]

2. Operational Flexibility

Wisconsin addresses the Title V operational flexibility provisions in statutory and regulatory sections entitled "Permit Flexibility." Referring to operational flexibility as "permit flexibility" is different terminology than this paper employs and illustrates how these terms are often scrambled. It is interesting that Wisconsin and some other states reviewed in this paper (Florida) found it necessary to pass specific legislation dealing with operational flexibility. Many states have not done so, assuming instead that general statutory grants of Title V rulemaking authority provided sufficient power to establish the necessary regulatory operational flexibility provisions.

Wisconsin's statutory Permit Flexibility section generally follows CAA section 502(b)(10) in allowing an existing source[405] with an operating permit (or one that has timely applied for an operating permit) to make a change that would otherwise require a permit revision, as long as the change is not a modification, as defined by the department by rule, and will not cause the source to exceed allowable emissions (whether expressed as an emission

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[403] 40 C.F.R. § 70.7(2)(v); WIS. ADMIN. CODE § NR 407.12(4)(c).

[404] 40 C.F.R. § 70.7(2)(i); WIS. ADMIN. CODE § NR 407.12(1).

[405] A deficiency has been detected in Wisconsin's definition of existing source. WIS. STAT § 133.30 defines an "existing source" as a source constructed or modified before Nov. 15, 1992. In other words, it would not cover sources constructed or modified after that date but before the date Wisconsin's Title V program becomes operational. The Attorney General's opinion submitted with as part of the Title V program submittal stated that a statutory change would be proposed in 1994 to correct this problem.

rate or in terms of total emissions).[406] The regulatory section clarifies that the type of change referred to is one that contravenes an express term of the permit, which is the basic Part 70 definition of a section 502(b)(10) change.[407] The rule also imposes the additional restrictions found in Part 70 that were missing in the Texas version of section 502(b)(10) changes - that the change cannot violate applicable requirements, and cannot violate permit terms and conditions that are monitoring, recordkeeping, reporting, or compliance certification requirements.[408]

The only difference between CAA section 502(b)(10), Part 70, and Wisconsin's version of section 502(b)(10) changes is that Wisconsin does not use the term "Title I modification." The statute only says that the change cannot be a modification as defined by rule. The Permit Flexibility rule in turn provides that the change cannot be a modification as defined in Wisconsin Statutes section 144.30(20), and rules promulgated thereunder.[409] Section 144.30(20) defines a modification in the same way as CAA section 111(a)(4)("any physical change in, or change in the method of operation of, a stationary source that increases the amount of emissions of an air contaminant or that results in the emission of an air contaminant not previously emitted").[410] The definition of modification in the rule promulgated under section 144.30(20) is the same as section 144.30(20).[411]

What all this means is that in accordance with EPA's revised interpretation, Wisconsin considers Title I modifications to include changes that would require minor NSR processing. This conclusion follows from tracking how Wisconsin defines "modification." If Wisconsin is to be consistent with the federal design, then Wisconsin's reference to "modification" in

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[406] WIS. STAT. § 144.391(4m). This section does not actually use the term "Title I modification" as section 502(b)(10) does. See further discussion, *infra*.

[407] WIS. ADMIN. CODE § NR 407.025, Permit Flexibility.

[408] WIS. ADMIN. CODE § NR 407.025(1)(a)1.

[409] WIS. ADMIN. CODE § NR 407.025(1)(a)2.

[410] *See supra* text accompanying note 248.

[411] WIS. ADMIN. CODE § NR 400.02(55).

both the statute and the rule must equate to "Title I modification" in section 502(b)(10) and Part 70. Wisconsin then defines "modification" expansively, as any increase in emissions, without limitation by the significance thresholds that are used for major NSR.

Another aspect of Wisconsin's section 502(b)(10) change provision which deserves mention is that it requires a minimum of 21 days notice in advance of the date on which the proposed change is to occur,[412] as opposed to the seven days required by the CAA and Part 70. Wisconsin's response to written comment from industrial sources such as 3M and General Motors suggesting that the 21-day notification period in the regulation be replaced with the federal minimum was simply that the 21-day notification is required by the statute.[413] Presumably, the DNR does not object to additional time in which to review the notice.[414]

Further, the Wisconsin statute expressly provides that the source may not make a section 502(b)(10) change if the DNR informs the source before the end of the 21-day notification period that the change is not an authorized one.[415] This is a more explicit statement of the permitting authority's role than in the Part 70 regulations. Part 70 does not specify that EPA or the permitting authority may disapprove a section 502(b)(10) change during the seven-day advance notice period. It only provides that if the change is later found not to qualify, the original terms of the permit remain fully enforceable.[416]

In other words, Part 70 assumes that the change will be made after seven days and that EPA or the permitting authority (or a court) may later determine that it does not qualify.

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[412] WIS. STAT § 144.391(4m).

[413] *Report on Comments and Responses on the Proposed Operation Permit Rule Package (NR 407)*, Comment 21, Jul. 22, 1993, *in* Wisconsin's Title V Program Submittal, Appendix L, Jan. 19, 1993.

[414] There is an exception for emergencies, WIS. STAT § 144.391(4m) as allowed by the Part 70 regulations, 40 C.F.R. § 70.4(b)(12). The statute requires the DNR to promulgate rules establishing a shorter time for advance notification of operational flexibility changes in case of emergency. However, the permit flexibility section in the regulations, WIS. ADMIN. CODE § NR 407.025, does not refer to emergencies, and no other provision in Ch. NR 407 appears to do so either.

[415] WIS. STAT § 144.391(4m).

[416] 57 Fed. Reg. at 32,267.

Possibly, Part 70 will be interpreted to allow the same permitting authority disapproval during the notification period that the Wisconsin statute expressly provides. However, at this point, it is not clear whether the advance notification procedures for operational flexibility in Part 70 are intended to provide EPA and the permitting authority with time to disapprove the change, or are merely designed to keep them informed and provide a record of changes.

It is interesting to note that in Wisconsin, the second type of mandatory operational flexibility provision required by Part 70 (emissions trading for the purposes of complying with a federally-enforceable emissions cap established in the permit) only requires seven days advance notice,[417] not 21 days. The statute is silent on emissions trading operational flexibility. In addition, there is no provision preventing the source from making the change if the permitting authority determines that it does not qualify.

3. Off-Permit Changes

Wisconsin's conservative approach to permit flexibility is most clearly reflected in its complete omission of any provision for off-permit changes. Wisconsin industry did request that off-permit changes be allowed, bolstering its comments by arguing that because the permit shield would not apply, sources would not make such changes without careful evaluation to ensure legality.[418] However, the DNR responded that:

> The rule as proposed [Wis. Admin. Code Ch. NR 407] provides many forms of operational flexibility including permit flexibility, alternate operating scenarios and administrative and minor permit revisions. The Department believes that these, along with writing "flexible permits" (i.e. permits that don't contain unnecessary detail) will meet industry's need for flexibility. While EPA allows for so-called "off-permit" changes in 40 CFR Part 70.4(b)(14), they have never defined the types of changes covered by this concept. They have included notification and recordkeeping requirements beyond those included in the permit. The Department will not allow for off permit changes until this concept is defined and a need for this type of flexibility is demonstrated.[419]

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[417] WIS. ADMIN. CODE § NR 407.025(2)(b).

[418] *Report on Comments and Responses on the Proposed Operation Permit Rule Package (NR 407)*, Comment 22, Jul. 22, 1993, *in* Wisconsin Part 70 Operation Permit Program Submittal, Appendix L, Jan. 14, 1993.

[419] *Id.*

It does not appear that Wisconsin has affirmatively prohibited off-permit changes. It could have done so by stating that anything not authorized in the permit is prohibited.[420] Without an express prohibition, there could be an issue whether Wisconsin has acted effectively to prohibit off-permit changes. Although it may be possible to imply a prohibition on off-permit changes from the fact that there is no express provision authorizing them, Part 70 seems to envision a clear-cut prohibition, with implementing procedures. Nevertheless, Wisconsin's approach does not seem to have drawn any EPA objection.

4. Administrative Permit Revisions

Wisconsin's version of administrative permit amendments is limited to the basic four categories in 40 C.F.R. § 70.7(d)(1). Wisconsin rejected a comment that it should include the provisions of 40 C.F.R. § 70.7(d)(1)(v) and (vi) relating to incorporation of changes approved under enhanced new source review and similar changes. The state indicated that it would not create an enhanced new source review program because such a program would prolong the state NSR program by about 60 days to allow for EPA's veto. It remarked that its program would integrate the duplicate procedures of the construction and operation permit (Title V permit) programs in Wisconsin without causing the delays of an enhanced construction permit program.[421] With regard to similar changes, Wisconsin recognized that Part 70 provides the opportunity for it to list additional types of administrative revisions to be approved by EPA, but that is not an authorization to create a general category of similar changes.[422] This contrasts with Texas' position that a state may allow for similar changes without specifying them in the regulation.

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[420] Knauss, Broome & Ward, *supra* note 114, at 79.

[421] *Report on Comments and Responses on the Proposed Operation Permit Rule Package (NR 407)*, *supra* note 418, Comment 87.

[422] *Id.*

C. California's Ventura County Air Pollution Control District

California is divided into 34 air pollution control and air quality management districts, with the California Air Resources Board (CARB) as the state air pollution control agency for all purposes set forth in federal law.[423] In 1993, California passed Assembly Bill 2288 to grant the districts authority to individually implement the Title V requirements.[424] The CARB obtained a state Attorney General opinion to demonstrate adequate legal authority for the districts to carry out the Title V program; the opinion is to be incorporated into each district's submittal.[425]

The districts have been separately developing and adopting their own Title V rules and programs. As of November 15, 1993, 19 of the 34 districts had adopted rules and submitted either a full or partial program, including the Bay Area, Santa Barbara, and South Coast.[426] The other 15 districts still had to adopt rules or finalize their programs.[427]

Several statewide problems with Title V authority have been detected which will require clean-up legislation. One problem is that California exempts equipment used in agricultural operations from permit requirements.[428] As a result, CARB declared that the districts would be requesting source category-limited interim approval.[429]

The Ventura County APCD (Ventura) was selected for review because it has a generally complete and satisfactory Title V program, with some interesting approaches to

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[423] CAL. HEALTH & SAFETY CODE § 39602 (1993).

[424] A.B. 2288, Stats. 1993, Ch. 1166 (effective Jan. 1, 1994), codified at CAL. HEALTH & SAFETY CODE §§ 39053.3, 39053.5, 42300, 42301, 42301.10, and 40752.

[425] Letter, Daniel E. Lungren, Attorney General, State of California, to Carol Browner, EPA Administrator, *California's Authority to Implement Title V (Operating Permits) of the Clean Air Act*, Nov. 12, 1993.

[426] Programs are submitted to the CARB and then transmitted to EPA .

[427] Letter, Michael H. Scheible, Deputy Executive Officer, California Air Resources Board, to Felicia Marcus, EPA Region IX Administrator, Nov. 15, 1993.

[428] CAL. HEALTH & SAFETY CODE § 42310. The other problems were inadvertent minor language problems with civil and criminal penalty provisions.

[429] Letter, Michael H. Scheible, Deputy Executive Officer, California Air Resources Board, to Felicia Marcus, EPA Region IX Administrator, Nov. 30, 1993.

flexibility. Ventura has identified approximately 60 facilities that will need a Title V operating permit.[430] Those facilities include a number of petroleum-related drilling and refining sites, and several naval installations. Ventura County has had an operating permit program for 20 years. The Title V program is designed as a supplement to the existing permit program. It will also be separate from the district's existing preconstruction review program.[431]

1. Operational Flexibility

Ventura County APCD Rule 33.4, Operational Flexibility, specifies three ways that a source can obtain operational flexibility: alternative operating scenarios, voluntary emission caps, and contravening express Part 70 permit conditions. "Voluntary emission caps" is Ventura's equivalent to emissions trading at the source's request to comply with a federally enforceable emissions cap in the permit. "Contravening express Part 70 permit conditions" is Ventura's equivalent to section 502(b)(10) changes. Thus, Ventura merges the requirements of 40 C.F.R. 70.4(b)(12)(i)(section 502(b)(10) changes) and (iii)(emissions trading to comply with a permit cap) with 40 C.F.R. section 70.6(a)(9) (alternate operating scenarios), recognizing that the latter are a significant component of operational flexibility. Ventura expressly states that any changes made under authority of Rule 33.4 shall not require a permit revision.

The alternative operating scenarios provision[432] generally follows 40 C.F.R. section 70.6(a)(9).[433] The provisions for voluntary emissions caps[434] and contravening express Part

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[430] Ventura's *Title V Operating Permit Program Submittal* is dated Nov. 18, 1993. It was transmitted to the CARB and then received by EPA on Dec. 6, 1993. For the California enabling legislation, *see supra* note 423. Ventura's Title V regulations are found at Ventura County Air Pollution Control District [hereinafter VCAPCD] Rule 33 (Part 70 Permits)(adopted Oct. 12, 1993).

[431] VCAPCD Rule 10; VCAPCD *Title V Operating Permit Program Submittal*, Program Description, at IV-1.

[432] VCAPCD Rule 33.4.B.

[433] Although it does not state that the terms and conditions of each alternative operating scenario must meet all applicable requirements and Part 70 requirements as required by 40 C.F.R. § 70.6(a)(9)(iii), that omission is rectified by VCAPCD Rule 33.3 A.12., Permit Content, which does provide that conditions for all reasonably anticipated operating scenarios shall meet all applicable requirements.

70 permit conditions[435] also generally correspond to their Part 70 parents, but there are some differences concerning the notification process, one of which may constitute a problem.

Under both the provisions for voluntary emission caps and contravening express Part 70 permit conditions, in accordance with 40 C.F.R. section 70.4(b)(12), Ventura properly requires written notification in advance of the proposed changes. However, Ventura extends the Part 70 minimum seven day advance notice period to 30 days, as Texas does for its operational flexibility changes. As has previously been discussed, this gives an air agency more time to review the notice, but causes industry more delay. Ventura also specifies that the source may make the change with 30 days written notification, unless the district objects in writing within the 30 day notice period.[436] As discussed with the Wisconsin program, Part 70 does not expressly state that the permitting authority can object to the proposed change.[437]

One important omission creates a deficiency. Under both provisions, Ventura has not required that the written notification must also be provided to EPA. 40 C.F.R. section 70.4(b)(12) requires notice to both the Administrator and the permitting authority. There is no indication why Ventura has omitted this requirement, and it could very well have been inadvertent. Of course, notice to EPA would be considered essential.

Under both the provisions for voluntary emission caps and contravening express Part 70 permit conditions, Ventura improves on Part 70 by explicitly listing in one place the criteria which must be met for a change to qualify,[438] and requiring the advance notification

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[434] VCAPCD Rule 33.4.C.

[435] VCAPCD Rule 33.4.D.

[436] For changes that contravene express Part 70 permit conditions, after the 30 day notice period, a source may operate in violation of the permit condition which was the subject of the notification if no written objection has been received from the district. VCAPCD Rule 33.9 A.2.

[437] *See supra* text accompanying note 416.

[438] For example, whereas 40 C.F.R. § 70.4(b)(12)(i) contains only two criteria for 502(b)(10) changes (not a Title I modification and do not exceed emissions allowable) and the reader must refer to the definition of 502(b)(10) changes in 40 C.F.R. § 70.2 to find the other two relevant criteria (do not violate applicable requirements and do not contravene monitoring etc. requirements), Ventura lists all these requirements together in Rule 33.4 D.

to demonstrate that the requested change meets all of the criteria. Although Part 70 requires the advance notice to describe the change and any emissions increase that will occur, it does not require a demonstration that the change will meet all the relevant criteria. This requirement may increase the effort needed by the source to complete the notice, but the source would have to make sure the criteria were met anyway. Another improvement is that Ventura makes it clear that the only basis for the district to object to an emissions trade or the contravening of an express Part 70 permit condition is if one or more of the listed criteria are not met.

2. Non-Federal Minor Changes

The most unique aspect of Ventura's Title V flexibility provisions is its "non-federal minor change." Ventura says that a non-federal minor change is what is referred to in Part 70 as an "off-permit" change.[439] However, it also states that a non-federal minor change will require a change in the Part 70 permit.[440] These statements appear to be contradictory, since the point of a Part 70 off-permit change is that it can be made without a change to the permit (i.e., without a permit revision). In order to evaluate the non-federal minor change, this section will look at several relevant Ventura rules.

Ventura Rule 31.1.13 defines a non-federal minor change as:

> A modification to a Part 70 permit that meets all of the following criteria:
>
> a. The modification is not addressed or prohibited by the federally-enforceable portion of the Part 70 permit.
>
> b. The modification is not a Title I modification.
>
> c. The modification does not violate any federally-enforceable requirements.
>
> d. The modification is not subject to any requirement under Title IV of the federal Clean Air Act.[441] (emphasis added).

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[439] VCAPCD *Title V Operating Permit Program Submittal*, Program Description, at III-6 - III-7; VCAPCD, *Guidelines for Part 70 Permit Applications*, Nov. 1993, at 12..

[440] VCAPCD, *Guidelines for Part 70 Permit Applications*, Nov. 1993, at 12.

[441] VCAPCD Rule 33.1.13. The rule cites 40 CFR 70.4(b)(14) and (15) as its "reference."

In Rule 33.5.D, Ventura sets forth the procedure for non-federal minor changes. The rule states that a source shall submit an application prior to implementing such a change. The application is to be submitted to the district with a copy to EPA. Ventura states that the change will be reviewed only by the district, and not by the EPA or the public. The copy of the application to EPA is simply for its records.[442] The district must take final action on the application within 90 calendar days of receipt. Final action can be one of three events: issuing the permit modification as proposed, denying the permit modification application, or determining that the proposed permit change does not meet the non-federal minor change criteria and should be reviewed as a significant or minor permit modification.

The only other reference in Ventura's rules to non-federal minor changes is in Rule 33.9.A, which provides an application shield. When a timely and complete application for a non-federal minor change has been submitted, the change addressed in the application may be implemented. If the change is implemented upon submission of the application, the source shall operate in compliance with all applicable conditions on its Part 70 permit, including any proposed permit conditions, until the Part 70 permit is revised or the modification is denied. During this time period, the source shall not be required to comply with the existing Part 70 permit conditions that it is seeking to modify. However, if the source fails to comply with any proposed permit conditions, the existing permit conditions may be enforced against it.[443]

Ventura has summarized the purpose of the non-federal minor change as follows:

> This provision may be used to permit a new emissions unit at a Title V source if the new unit's operation will not affect any federally enforceable permit condition for the existing units. In this case, the EPA requires that the new unit be handled "off-permit," that is left off the federally-enforceable part of the Title V permit until permit reissuance. Such permit conditions will be included in the nonfederally-enforceable part of the permit until reissuance occurs.[444]

This example of what would constitute a non-federal minor change and how it would

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[442] VCAPCD, *Guidelines for Part 70 Permit Applications*, Nov. 1993, at 12.

[443] VCAPCD Rule 33.9 A.1.

[444] *Id.* at III-7.

work appears to comport with Part 70. However, Ventura has confused the issue by referring to a non-federal minor change as a modification to the Part 70 permit. This makes it sound as though it involves a revision to the federally enforceable portion of the permit. Of course, a Part 70 off-permit change does not require a permit revision and thus is not a modification (to the permit). Moreover, there is no application or application shield. Under Part 70, an off-permit change refers to an operational change at the source, not a change to the permit. But Ventura defines a non-federal minor change as a modification (or a change) to the Part 70 permit itself. Ventura's definition of "Part 70 permit" does not resolve the confusion, either. A "Part 70 permit" is simply defined as a "permit issued by the District to fulfill the requirements of Title V of the federal Clean Air Act and 40 CFR Part 70."[445]

Despite the language, it appears that Ventura does not intend to modify the federally enforceable portion of the Part 70 permit. When Ventura says that the modification cannot be addressed or prohibited by the federally-enforceable portion of the permit, it must really mean that the underlying change cannot be addressed or prohibited, or its approach would not work.

In the example given above of a new emissions unit, Ventura seems to be talking about the *addition* of a permit term or condition to the state-only portion of the permit through a procedure similar to that used for a minor permit modification. Part 70 does allow a state to include off-permit changes in the portion of the permit that is not federally enforceable. If it does so, it must establish procedures which at least provide EPA with notice of the change.[446] Ventura has done this, by ensuring that EPA receives a copy of the application (although EPA review is not anticipated).

If Ventura is simply adding a permit term or condition to the state-only portion of the permit, why does it use the term "modification to the Part 70 permit?" Would there be a situation where there would be a modification of a state-only permit term or condition? This

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[445] VCAPCD Rule 33.1.14.

[446] 57 Fed. Reg. at 32,270.

seems to be the scenario Ventura had in mind. In the program description it gives an alternative name to a non-federal minor change - "modification of a permit condition that is not federally enforceable."[447]

Can the procedures Ventura has chosen be used for the modification of a state-only permit term? The procedures are similar to minor permit modification procedure, except that there is no certification by a responsible official and no affected state or EPA review. Using procedures less rigorous than minor permit modification procedures to add an "off-permit change" to a permit was found objectionable in the Texas program. But the distinction is that the objection to Texas' permit addition procedures only holds if Texas is calling permit terms state-only when they really are federally enforceable. When the addition or modification is truly to the state-only portion of the permit, the state may use whatever procedures it chooses, as long as EPA receives notice of the change.[448] Of course, the change must also be brought onto the federally enforceable portion of the permit at renewal.

The next question is whether Ventura can provide an application shield for a non-federal minor change. Based on the above discussion that a state can use whatever procedure it wants to add or modify a state-only condition of the permit, the answer would appear to be yes. This is not the same issue as with Texas' significant permit modification procedure, where the application shield was not valid.

3. Minor Part 70 Permit Modifications

Ventura's version of minor permit modifications[449] is generally the same as Part 70's. There are several differences in the criteria used, but whether they are significant is debatable.

First, whereas Part 70 states that a minor permit modification cannot violate any

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[447] VCAPCD *Title V Operating Permit Program Submittal*, Program Description, at III-6.

[448] 57 Fed. Reg. at 32,270. *See also*, Novello, *supra* note 9, at 10,092. "An important point, nearly hidden in another part of the preamble, is that emission limits based *solely on state law* (not CAA requirements) may be revised under *whatever* procedures the state chooses. EPA states that procedures for such changes need not meet minimum CAA Title V requirements." (Citing 57 Fed. Reg. at 32,268 and 40 C.F.R. § 70.6(b)(2)).

[449] VCAPCD Rule 33.1.10.

applicable requirement, Ventura states that it cannot violate any "federally-enforceable requirement."[450] This different term raises the question whether a "federally-enforceable requirement" is the same as an "applicable requirement?" Under Part 70, permit terms and conditions must be established to assure compliance with all applicable requirements,[451] but the terms and conditions themselves are not applicable requirements.[452] Under Part 70, federally-enforceable requirements include *all* terms and conditions in the permit (except those not required under the Act or under any of its applicable requirements).[453] Thus, the term "federally-enforceable requirement" is broader than "applicable requirement," at least under Part 70. A federally-enforceable requirement is the permit term that in turn requires compliance with an applicable requirement. Ventura, however, defines "federally-enforceable requirement" to include what Part 70 defines as "applicable requirements," as well as Part 70 permit conditions.[454] Thus, Ventura's criterion that the modification cannot violate any federally-enforceable requirement is saying that not only can the modification not violate any applicable requirement, it also cannot violate any Part 70 permit term or condition. This is probably a distinction without a difference, since a modification necessarily involves a change to a permit term or condition so that it will not be violated.

Another difference is that Ventura omits the following underlined language from one of the Part 70 minor permit modification gatekeepers:

> [The minor permit modification cannot] require or change a case-by-case determination of an emission limitation or other standard, or a source-specific determination for temporary sources of ambient impacts, or a visibility or increment analysis.[455] (emphasis added).

However, this omission is not nearly as important as Texas' alteration of the first clause of the

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[450] 40 C.F.R. § 70.7(e)(2)(i)(A)(1); VCAPCD Rule 33.1 10.b.

[451] 40 C.F.R. § 70.6(a).

[452] 40 C.F.R. § 70.2.

[453] 40 C.F.R. § 70.6(b).

[454] VCAPCD Rule 33.1 9.

[455] 40 C.F.R. § 70.7(e)(2)(i)(A)(3)

same section.[456] Ventura omits the underlined language because it does not expect these situations to arise in its area. For instance, as a practical matter, visibility or increment analysis is never required in Ventura. Although visibility and increment analysis is usually a requirement in attainment (PSD) areas, and Ventura is PSD for all pollutants except ozone, Ventura does not have delegated authority for PSD. In addition, the strictness of Ventura's NSR rule would prevent sources from meeting the PSD criteria. Moreover, there are no sources of SO_2 emissions, and NO_x is considered an ozone precursor. Thus, Ventura does not do visibility or increment analyses, and does not expect to do so. Nevertheless, despite Ventura's belief that the language omitted from the gatekeeper is unnecessary based on its special circumstances, EPA has indicated that as part of interim approval it will require the language to be restored.[457]

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[456] *See supra* text accompanying notes 348-54.

[457] Telephone conversation with Karl E. Krause, Manager, VCAPCD Engineering Section, Aug. 2, 1994.

D. Florida

Florida submitted its Title V program on time.[458] There are an estimated 650 major sources subject to the Title V program in Florida, where Title V permits are called "air operation permits" or "operation permits."[459] Florida's Title V program stands alone from its state air operation permit program[460] and air construction permit program,[461] both of which have been in existence since 1972. A source that obtains a Title V permit will not need any other air operation permit, but preconstruction review and an air construction permit will still be required.[462] Florida's air agency is the Department of Environmental Protection (DEP).[463]

Florida has developed a unique scheme to implement the Part 70 flexibility provisions. Five rules comprise Florida's flexibility provisions:

1. Rule 17-213.400 - Permits and Permit Revisions Required
2. Rule 17-213.410 - Changes Without Permit Revision
3. Rule 17-213.412 - Immediate Implementation Pending Revision Process
4. Rule 17-213.415 - Trading of Emissions Within a Source
5. Rule 17-210.360 - Administrative Permit Corrections

As can be seen, Florida has reorganized and renamed many of the Part 70 flexibility terms. For example, the Rule entitled "Immediate Implementation Pending Revision Process" is actually the Florida counterpart to Part 70's minor permit modification. Florida has also altered the Part 70 structure, using a lot of cross-referencing between the various flexibility provisions. This makes it difficult to decipher Florida's approach.

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[458] Florida's enabling legislation is found at FLA. STAT. ANN. § 403.0872 (1992). Florida's Title V Rules are found at FLA. ADMIN. CODE ANN. Ch. 17-213 (adopted Sept. 23, 1993).

[459] FLA. ADMIN. CODE ANN. Rule 17-213.010.

[460] FLA. ADMIN. CODE ANN. Ch. 17-210.

[461] FLA. ADMIN. CODE ANN. Ch. 17-212.

[462] John C. Brown, Jr., Administrator, Permitting and Standards Section, Bureau of Air Regulation, Fla. DEP, *Title V Permitting, paper for* Florida Chamber of Commerce Tenth Annual Environmental Permitting Short Course, Jan. 19-21, 1994, at 3.

[463] Formerly, the Department of Environmental Regulation. The name was only changed to the Department of Environmental Protection in early 1994. Consequently, the Title V regulations still refer to the Department of Environmental Regulation.

Even EPA had trouble understanding Florida's Title V program. After review of Florida's submission, EPA sent a long list of substantive comments raising questions and pointing out areas where problems were perceived.[464] Florida recently responded, providing supplemental information to answer EPA's concerns.[465] In fact, Florida styled its response as a supplement to its Title V program submittal. The supplement includes some proposed changes to Florida's Rules, which are scheduled to be made through corrective action rulemaking and adopted by October 1, 1994.[466] The following discussion will refer at times to EPA's comments and Florida's supplement, as a means of illustrating how Florida's flexibility provisions work.

1. Changes Without Permit Revision

The Florida Title V enabling legislation contains one subsection devoted to operational flexibility. As would be expected, that subsection is derived from CAA section 502(b)(10):

> Permits issued under this section must allow changes within a permitted facility without requiring a permit revision, if the changes are not physical changes in, or changes in the method of operation of, the facility which increase the amount of any air pollutant emitted by the facility or which result in the emission of any air pollutant not previously emitted by the facility, and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions), provided that the facility provides the administrator and the department with 30 days' written, advance notice of the proposed changes. The department shall adopt Rules implementing this flexibility requirement.[467] (emphasis added).

Note the two differences between CAA section 502(b)(10) and Florida's provision, shown by

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[464] Letter, Douglas Neeley, Chief, EPA Region IV Air Program Branch, to Fla. DEP, May 3, 1994, with attachment entitled EPA Region IV State of Florida Title V Program Review, Substantive Comments, Enclosure 1, at 10 [hereinafter EPA Florida Program Review Comments, at __].

[465] Letter, Fla. DEP to John Hankinson, EPA Region IV Administrator, July 8, 1994, with attachment entitled Response to Sections B Through G of EPA's Substantive Comments [hereinafter Florida Response to EPA Comments, at __].

[466] The proposed changes to Florida's Rules are cited to Proposed FLA. ADMIN. CODE ANN. Rule 17-213.___ , Florida DEP Workshop Draft, July 13, 1994.

[467] FLA. STAT. ANN. § 403.0872(12).

the underlining. First, like some other states, Florida has increased the requirement for seven days advance notice to 30 days, to allow more time for review by the DEP.

Second, Florida has substituted certain language in place of the words "modifications under any provision of subchapter I of this chapter" (Title I modifications) found in CAA section 502(b)(10). Florida's language is the same as the definitions of modification in Parts C and D of Title I (which, as we have seen, rely on the CAA section 111(a)(4) definition), but does not contain the definitional elements in EPA's implementing regulations for major modifications.[468] As a result, Florida seems to be accepting the interpretation of the term "Title I modification" as including even changes that qualify only for minor NSR.[469] It should be noted that Florida does require minor source construction permits. Unless exempted, minor sources not subject to federally required NSR must obtain an air construction permit.[470] If located in a nonattainment area, such sources must meet any applicable Reasonably Available Control Technology (RACT) requirements.[471]

Rule 17-213.410, Changes Without Permit Revision, implements the statutory operational flexibility subsection. The rule mentions four ways of making changes without a permit revision, but defers one of them (emissions trading) to another rule. The four types of changes that can be made without a permit revision, in order listed in the rule, are: (1) alternative *methods* of operation, (2) changes under a new or revised construction permit issued through enhanced NSR, (3) any other operating changes, and (4) alternative *modes* of operation (emissions trading).

a. Alternative Methods and Modes of Operation

To explain this confusing mix, it may be easiest to begin with the distinction Florida

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[468] *See supra* text accompanying notes 247-58.

[469] Preston Lewis, Supervisor, Bureau of Air Regulation, Florida DEP, *Florida Air Permitting - DEP Perspective, paper for* Florida Chamber of Commerce Tenth Annual Environmental Permitting Short Course, Jan. 19-21, 1994, at 7-8.

[470] FLA. ADMIN. CODE ANN. Rule 17-212.400.

[471] FLA. ADMIN. CODE ANN. Rule 17-296.500.

makes between alternative methods and modes of operation. Alternative methods of operation are the equivalent of Part 70's alternative operating scenarios.[472] The Florida rule is brief, simply stating that: "[p]ermitted sources may change among those alternative methods of operation allowed by the source's permit as provided by the terms of the permit."[473] Florida describes alternative methods of operation as "alternative means of operating one or more emissions units in a Title V source such that air pollutant emissions may be affected," but is careful to make clear that this authorization does not include emissions trading.[474]

As an example of alternative methods of operation, Florida cites a combustion unit capable of firing multiple fuels. Each fuel or mixture of fuels that the source expects to use should be identified as an alternative method of operation. Another example Florida gives is that of a volatile organic liquid storage tank or collectively regulated group of tanks where emissions would vary according to the type of liquid being stored. In such a case, each type or class of liquid the source expects to handle should be identified as an alternative method of operation.[475]

There are several differences between Florida's alternative methods of operation and the alternative operating scenarios provision at 40 C.F.R. section 70.6(a)(9). One is that although Florida requires sources to use logs or records to verify periods of operation in each alternative method of operation, it does not specify that these must be kept contemporaneously with the changes. Another is that the Florida rule does not specify that the terms and conditions of each alternative method of operation must meet all applicable requirements and the requirements of the Title V regulations. However, in a separate rule dealing with permit content, Florida rectifies this by stating that each permit shall address all

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[472] *See supra* text accompanying notes 162-73.

[473] FLA. ADMIN. CODE ANN. Rule 17-213.410(1).

[474] State of Florida, Department of Environmental Protection, Division of Air Resources Management, *Instructions for DEP Form No. 17-210.900(1), Application for Air Permit*, effective July 1, 1994, at 21.

[475] *Id.* at 31.

applicable requirements for each method of operation proposed by the applicant.[476]

Florida defines alternative methods of operation that involve emissions trading among emissions units as alternative "modes" of operation.[477] Rule 17-213.410(4) provides that changes involving "modes" of operation may be made only in accordance with Rule 17-213.415. Rule 17-213.415 authorizes only one type of emissions trading - trading for the purpose of complying with a federally enforceable emissions cap established in the permit independent of otherwise applicable requirements. This is the same as the mandatory emissions trading operational flexibility provision required by 40 C.F.R. section 70.4(b)(12)(iii).[478]

EPA commented that Rule 17-213.415 did not appear to address all of the requirements of 40 C.F.R. section 70.4(b)(12)(iii).[479] Specifically, EPA stated that the permit application should include proposed replicable procedures and permit terms that ensure the emissions trades are quantifiable and enforceable, and that the issued permit should include all terms required under 40 C.F.R. section 70.6(a) and (c) to determine compliance. However, Rule 17-213.415 does require the source to submit with its application a list of all emission units which would be subject to trading, a description of each mode of operation that would be used at any given time, and a plan for quantifying emissions trading increases and decreases and for demonstrating continuous compliance in each mode of operation.[480] In addition, the rule states that the source shall provide replicable procedures to demonstrate continuous compliance with any trading provisions requested and with applicable requirements, for each mode of operation.[481] Nevertheless, Florida responded to EPA that

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[476] FLA. ADMIN. CODE ANN. Rule 17-213.440(1).

[477] *Instructions for DEP Form No. 17-210.900(1), Application for Air Permit, supra* note x, at 21.

[478] *See supra* text accompanying notes 185-94.

[479] EPA Florida Program Review Comments, *supra* note 464, at 10.

[480] FLA. ADMIN. CODE ANN. Rule 17-213.415(1)(a)-(c).

[481] FLA. ADMIN. CODE ANN. Rule 17-213.415(2).

it would make changes to Rule 17-213.415 to include replicable procedures.[482]

As required by its statute,[483] Florida requires a source to provide 30 days written advance notice to the DEP and EPA before implementing each mode of operation. EPA also commented that the written notification should require the source to describe when the change will occur and to describe the changes in emissions that will result and how the increases and decreases will comply with the permit.[484] Florida has agreed to correct the notice requirements. One of the proposed changes would add the requirement that the notification by the source shall identify the mode of operation and the date upon which the change will occur.[485]

b. Construction Permit Terms

Alternative methods and modes of operation are two of the four ways of making a change without a permit revision in Florida. The next change to discuss is Rule 17-213.410(2)'s authorization for sources to implement the terms or conditions of a new or revised construction permit if certain conditions are met.[486] This should be discussed in conjunction with Florida's Rule 17-210.360, Administrative Permit Corrections.

Rule 17-210.360 is not located in Florida's Title V Rules. It is found in Chapter 210, Stationary Sources - General Requirements, which contains the basic requirements for Florida's state air construction permit and air operation permit programs. Rule 17-210.360's administrative permit corrections are very similar to Part 70's administrative permit amendments, although unlike Part 70, administrative permit corrections are not considered

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[482] Florida Response to EPA Comments, *supra* note 465, at 8.

[483] FLA. STAT. ANN. § 403.0872(12).

[484] EPA Florida Program Review Comments, *supra* note 464, at 10.

[485] Proposed FLA. ADMIN. CODE ANN. Rule 17-213.415(3), Florida DEP Workshop Draft, July 13, 1994.

[486] The conditions are essentially the same as the conditions for incorporation of preconstruction review permit terms via administrative permit correction, discussed next.

permit revisions in Florida.[487]

Administrative permit corrections cover the basic categories found in Part 70: typographical errors, name, address, phone number change, similar clerical changes, and changes requiring more frequent monitoring and reporting. There is no "similar changes" category. The source submits a letter to notify the DEP of minor corrections to information contained in a permit and the DEP corrects the permit within 60 days.

There is also a subsection authorizing incorporation of preconstruction review permit terms as allowed by 40 C.F.R. section 70.7(d)(1)(v). It provides that:

> The Department shall incorporate requirements resulting from issuance of new or revised construction permits into existing operation permits issued pursuant to Chapter 17-213, F.A.C., if the construction permit revisions incorporate requirements of federally enforceable preconstruction review and if the applicant requests at the time of application that all of the requirements of Rule 17-213.430(1), F.A.C., be complied with in conjunction with the processing of the construction permit application.[488]

Of course, "existing operation permits issued pursuant to Chapter 17-213" are Title V permits. Thus, Rule 17-210.360 authorizes the incorporation of construction permit terms and conditions into Florida Title V permits, if the enhanced procedural requirements of 40 C.F.R. section 70.7(d)(1)(v) are met. Rule 17-213.430(1) does indeed seem to provide for the full review process required for permit issuance, including EPA veto, which would meet the requirements for enhanced NSR. Apparently, Florida allows a source to request on an individual basis that the enhanced process be used.

If Rule 17-210.360 allows incorporation of preconstruction review permit terms via administrative permit correction, one may wonder why Rule 17-213.410(2) is necessary. Rule 17-213.410(2) provides that permitted sources may implement the terms or conditions of a new or revised construction permit if the same procedures that Rule 17-210.360 requires are followed. It would seem that Rule 17-213.410(2) exists to authorize the source to make

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[487] FLA. ADMIN. CODE ANN. Rule 17-213.100. "Permit revision" means any alteration to a permit term or condition except the Administrative Permit Correction described at Rule 17-210.360."

[488] FLA. ADMIN. CODE ANN. Rule 17-210.360(3).

the *changes* authorized by the new construction permit terms or conditions immediately, without going through a permit revision. In contrast, Rule 17-210.360 authorizes the terms and conditions themselves to be incorporated into the permit.

EPA commented that there is a problem with Florida's incorporating preconstruction review requirements into Title V permits using administrative amendments. EPA points out that in order to do this, "Florida's preconstruction review program must be approved by EPA as having procedural and compliance requirements that are substantially equivalent to EPA's Part 70 requirements pursuant to 40 C.F.R. section 70.7(d)(1)(v) (e.g., a SIP revision adding the required 'enhanced' NSR SIP elements)."[489] EPA said that it would continue to work with the state to clarify the needed changes to the SIP.

Florida responded that EPA misunderstood Rule 17-213.410(2). Florida stated that the rule does not contemplate that the Title V permit revision will be accomplished as part of the preconstruction review process.[490] This response indicates that Florida misunderstood EPA's comment. EPA was not concerned about the Title V permit revision being accomplished as part of the preconstruction review process, but the preconstruction review permit terms being incorporated as part of the Title V process (the administrative amendment process).

In any event, Florida then went on to describe what it intended:

> The State of Florida provisions for incorporating terms of preconstruction permits into Title V permits now require, at Rule 17-213.410(2), F.A.C., that all procedural and substantive requirements of the Title V program for application contents, certification, public notice, affected state review and EPA review be accomplished in accordance with the provisions of the Title V program before the amendment process can take place. The rule does not require that the FDEP accomplish all this as part of the SIP process. The FDEP can duplicate the application and process the proposed revisions to the construction and operating permits separately and concurrently in accordance with the requirements of the SIP and Title V programs, and then simply amend the Title V permit once all the procedural and substantive requirements have been met. The provision simply relieves an applicant of the burden of completing and submitting two substantially identical applications and then

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[489] EPA Florida Program Review Comments, *supra* note 464, at 2-3.

[490] Florida Response to EPA Comments, *supra* note 465, Supplementary General Counsel Opinion, at 9.

> publishing two substantially similar public notices. And the procedure assures expedited processing of the Title V application since the construction permit will likely also determine the Title V permit action and the administrative hearing process can be combined for both actions. But all normal Title V processes must be accomplished prior to final agency action on the Title V permit and it is possible, even likely, that the applications for construction and Title V permits will be processed in different FDEP offices.[491]

This response in effect is saying that preconstruction permit terms can be incorporated into the Title V permit not because they have been through an enhanced preconstruction review program, but because they have been through the full Title V process. But Part 70 is not structured like that. If there is no enhanced preconstruction review program (approved by EPA into the SIP), then administrative amendments cannot be used to incorporate preconstruction permit terms.[492] The state would have to use significant permit modification procedure. In addition, it still appears that Rule 17-213.410(2) only authorizes implementation of changes underlying new preconstruction terms, and it is Rule 17-210.360 that authorizes incorporation of the permit terms by administrative amendment. Further clarification appears to be necessary in this area.

c. *Operating Changes*

The fourth and final category of changes that can be made without a permit revision under Rule 17-213.410 is quite simply referred as "any other operating changes." The rule provides that: "[p]ermitted sources may implement any other[493] operating changes after the source provides the Department and EPA with at least 7 days written notice prior to implementation."[494] This provision seems similar to Part 70 section 502(b)(10) changes. The crucial issues are whether this provision is intended to reflect only section 502(b)(10)

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[491] *Id.*

[492] 40 C.F.R. § 70.7(d)(1)(v).

[493] The term "any other" apparently means any operating changes other than those dealt with in the other subsections of Rule 17-213.410, e.g., alternative methods of operation, implementation of preconstruction permit terms.

[494] FLA. ADMIN. CODE ANN. Rule 17-213.410(3).

changes, and if so, whether it reflects them consistently with Part 70.[495]

First though, there may be a problem with the advance notice period if this form of operational flexibility is constrained by Florida's enabling legislation, as one would expect. The rule reduces the statute's 30 day advance notice requirement to seven days.[496] Florida retains a 30 day notice requirement for emissions trading, which is one way of implementing CAA section 502(b)(10). But "operating changes" also seem to implement CAA section 502(b)(10), as does the Florida statute. In that case, logically the statute's 30 day requirement should control the rule, and "operating changes" should require 30 days notice.

To understand what "operating changes" are, one must turn again to the definitions section, where "operating change" is defined as:

> Any physical change to, or change to the operation of, any Title V source or any emissions unit within any Title V source which contravenes a permit term or condition, other than one described at Rule 17- 213.400(2)(a) - (g), F.A.C., but which does not result in the increase of actual emissions of any regulated pollutant or result in the emissions of any pollutant not previously emitted, and which does not subject the source to a requirement for permit revision pursuant to Rule 17-213.400, F.A.C., except that physical changes and changes to operation do not include: routine maintenance, repair, replacement of component parts of any emissions unit; or any increase in hours of operation or in the production rate unless the change would be prohibited under any permit restriction on hours of operation or production rate included in a federally enforceable air construction or air operation permit.[497] (emphasis added)

This is a very complicated definition to sort out and compare to Part 70. In effect, Florida has defined operating changes by merging the definitions of "modification" under the CAA for NSR with a portion of Part 70's definition of section 502(b)(10) changes. The reference to a change "which contravenes a permit term or condition," is clearly taken from the Part 70 definition of section 502(b)(10) changes. The limitation of operating changes to those that do not increase emissions or result in emissions of a new pollutant may be intended

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[495] EPA requested clarification on this point during development of the Rule. Letter, Jewell A. Harper, Chief, EPA Region IV Air Enforcement Branch, to Howard L. Rhodes, Director, Air Resources Management Division, Florida DEP, May 25, 1993, at 2.

[496] *See supra* text accompanying note 467.

[497] FLA. ADMIN. CODE ANN. Rule 17-213.100(24).

to replicate section 502(b)(10)'s restriction against changes that exceed emissions allowable, or may be derived from the CAA definition of modification in Parts C and D of title I.[498] The exception portion of the definition is drawn from the EPA regulatory definition of a major modification.[499]

The Florida definition of "operating change" also provides that certain changes which are listed in the subsections of a different rule, Rule 17-213.400(2)(a) - (g), are *not* "operating changes." The referenced subsections would exclude any change that:

> (a) Constitutes a modification;
>
> (b) Violates any applicable requirement;
>
> (c) Exceeds the allowable emissions of any air pollutant from any unit within the source;
>
> (d) Contravenes any permit term or condition for monitoring, testing, recordkeeping, reporting or of a compliance certification requirement;
>
> (e) Requires a case-by-case determination of an emission limitation or other standard or a source specific determination of ambient impacts, or a visibility or increment analysis under the provisions of Chapters 17-212 or 17-296, F.A.C.;
>
> (f) Violates a permit term or condition which the source has assumed for which there is no corresponding underlying applicable requirement to which the source would otherwise be subject;
>
> (g) Results in the trading of emissions among units within a source except as specifically authorized pursuant to Rule 17-213.415, F.A.C.[500]

Again, this list involves a merging of Part 70 flexibility concepts. It merges some of the criteria for Part 70 minor permit modifications with some of the Part 70 restrictions on section 502(b)(10) changes. Some of the provisions are the same for both. For example, Part 70 section 502(b)(10) changes cannot violate any applicable requirement, and minor permit modification procedures likewise cannot be used for changes that violate any applicable requirement. The prohibition against a change exceeding emissions allowable under the

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[498] *See supra* text accompanying notes 243-55.

[499] *See supra* text accompanying notes 255-61.

[500] FLA. ADMIN. CODE ANN. Rule 17-213.400(2), Permits and Permit Revisions Required.

permit is a restriction applicable to section 502(b)(10) changes, but not minor permit modifications. The restriction against changes requiring a case-by-case determination is applicable to minor permit modifications, but not section 502(b)(10) changes. One might wonder why Florida found it necessary to ensure that its definition of "operating changes" excluded any change requiring a case-by-case determination when that was not required by Part 70. However, the fact that Florida did so should not be a problem since that type of change, being outside the minor permit modification criteria, would also be outside the section 502(b)(10) criteria.

EPA commented on Rule 17-213.410, contending that it did not specify that operating changes were only allowed if the changes were not modifications under any provision of Title I and the changes do not exceed the emissions allowable under the permit.[501] In other words, EPA claimed that Rule 17-213.410 did not adequately reflect the requirements of CAA section 502(b)(10) and Part 70's definition of section 502(b)(10) changes. Florida responded in part that the term "emissions allowable under the permit" is not used in the rule and does not need to be defined.[502] However, it should also be noted that Florida's definition of "operating changes" would apparently exclude changes that exceed the allowable emissions of any air pollutant from any unit within the source. It does this by reference to Rule 17-213.400. Rule 17-213.400(c) refers to any change that "exceeds the allowable emissions of any air pollutant from any unit within the source. That reference should satisfy EPA's objection concerning emissions allowable.

The Title I modification issue is more complicated. It requires unraveling a series of cross-references. By reference to Rule 17-213.400, Florida's definition of "operating changes" also excludes changes that "constitute a modification."[503] The meaning of this reference depends on how "modification" is defined. For a definition of "modification" in

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[501] EPA Florida Program Review Comments, *supra* note 464, at 10.

[502] Florida Response to EPA Comments, *supra* note 465, at 14.

[503] Rule 17-213.400(2)(a) refers to changes that "constitute a modification."

Florida's Title V Rules, one must look to Rule 17-213.100(22). However, that definition in turn merely consists of cross-references to the definitions of modification in any of five different federal or state rules: Rule 17-212.200, 40 C.F.R. 60.2 (NSPS), 40 C.F.R. 61.15 (NESHAPs), 40 C.F.R. 52.01 (SIP), or 42 U.S.C. 7412(a) (HAPs). The question is whether all these definitions of modification comprise a "Title I modification."

The pertinent part of the definition of modification in Rule 17-212.200 (Stationary Sources - Preconstruction Review - Definitions), is:

> Any physical change in, change in the method of operation of, or addition to a stationary source or facility which increases the actual emissions of any air pollutant regulated under Rule 17-210, 17-212, 17-252, 17-272, 17-273, 17-275, 17-296, or 17-297, F.A.C., including any not previously emitted, from any source or facility.[504] (emphasis added)

Thus, a modification under Rule 17-213.400(2)(a) includes a change which increases the emissions of any regulated air pollutant. If a modification in Florida is defined as any increase in emissions then it should satisfy even the EPA's revised interpretation of Title I modification as including changes that trigger minor NSR. It appears that Florida actually does exclude Title I modifications with its current rule, albeit through a maze of cross-references.

In its response, Florida affirmed that "operating changes" under Rule 17-213.410(3) cannot be made if they are Title I modifications. Florida advised EPA to note the definition of modification at Rule 17-213.100(22) and said: "If there are any other modifications under Title I, please advise. We know of none."[505] Florida is aware of EPA's view of Title I modifications as including minor NSR. In its comments, EPA had separately advised Florida: "Please note that EPA has determined that changes under the minor source NSR program ... must be considered title I modifications."[506] Florida's response was: "Noted."[507]

Even though the above analysis shows that Florida's current rule does exclude Title

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[504] FLA. ADMIN. CODE ANN. Rule 17-212.200(46).

[505] Florida Response to EPA Comments, *supra* note 465, at 14.

[506] EPA Florida Program Review Comments, *supra* note 464, at 11.

[507] Florida Response to EPA Comments, *supra* note 465, at 18.

I modifications from "operating changes," Florida has agreed to amend its rules to make this more clear. The definition of "operating change" will be amended to also prohibit changes that would "constitute a modification."[508]

d. Off-Permit Changes

One final area to consider is whether Florida allows off-permit changes. EPA was confused about this, thinking that Rule 17-213.410, which we have just discussed, did allow off-permit changes. EPA commented that: "It is not clear in Florida's Rule 17-213.410 that an off-permit change will meet all applicable requirements and will not violate any existing permit term or condition.[509] EPA was presuming that Rule 17-213.410 provides for off-permit changes. But if an "operating change" is one that contravenes a permit term, it is difficult to see how the definition could encompass off-permit changes. Off-permit changes are those that are not addressed or prohibited by the permit. A change that contravenes a permit term would be one that is prohibited by the permit. Fortunately, this issue is easily cleared up. Florida emphatically responded that "[n]o off-permit changes are allowed for Title V sources."[510]

2. Immediate Implementation Pending Revision Process

The only permit revision process to discuss is Florida's equivalent of minor permit modifications, awkwardly named the "Immediate Implementation Pending Revision Process." (Florida does not treat administrative permit corrections as permit revisions.) Curiously, Florida apparently planned originally not to even have a minor permit modification process.[511]

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[508] Proposed FLA. ADMIN. CODE ANN. Rule 17-213.100(24), Florida DEP Workshop Draft, July 13, 1994 (formerly FLA. ADMIN. CODE ANN. Rule 17-213.100(22).

[509] EPA Florida Program Review Comments, *supra* note 464, at 10.

[510] Florida Response to EPA Comments, *supra* note 465, at 15.

[511] Letter, Harper to Rhodes, *supra* note 496, at 4. "The concept of not having minor permit modifications appears to be acceptable; however, all EPA headquarters offices have not formally concurred on this determination. Note that requirements in Sections 502(b)(6), 42 U.S.C. § 7661(a)(b)(6), and 40 C.F.R. Section 70.7(e)(2) necessitate some basis for prioritizing permit modifications depending upon the significance and complexity of the requested modification. In the absence of a regulatory framework for providing streamlined procedures for processing permit modifications, Florida should be prepared to demonstrate

That may account for its peculiar approach in this area.

Although Rule 17-213.412 is the provision for the "Immediate Implementation Pending Revision Process," Rule 17-213.400, "Permits and Permit Revisions Required," is also relevant. Rule 17-213.400 provides that except for changes under Rule 17-213.410 (e.g., alternative methods, operating changes), no source shall make any change in its operation without first applying for and receiving a permit revision, if the change meets any of the requirements listed in subsections (2)(a)-(g). Those subsections were previously quoted in connection with the discussion of the definition of operating changes and need not be repeated here.[512] As noted, many of the criteria in subsections (2)(a)-(g) are derived from the Part 70 minor permit modification criteria.

The essence of Rule 17-213.412 is that it allows a Title V source to immediately implement qualifying changes, but only after they have been incorporated into the terms and conditions of a new or revised construction permit.[513] As Florida explains, the rule was established to meet the Part 70 permit revision requirements without unnecessary delay in obtaining the air construction permit required by state rule. In developing the rule, the critical issue was allowing the source to implement the modification when the construction permit is completed.[514]

The gatekeepers for Rule 17-213.412 are found in subsection (1), and once again raise the issue of Title I modifications. Rule 17-213.412(1) provides that:

> (1) Those permitted sources making any change that constitutes a modification pursuant to Rule 17-213.400(2), F.A.C., but which would not require preconstruction EPA review pursuant to 40 CFR 60.14, 40 CFR 61.15 or 40 CFR 52.21, all of which are incorporated by reference, may implement such change prior to final issuance of a permit revision in accordance with this section, provided it:
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> (a) Does not violate any applicable requirement;

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how it will meet these requirements through Department standard operating procedure."

[512] *See supra* text accompanying note 500.

[513] FLA. ADMIN. CODE ANN. Rule 17-213.412(2).

[514] Florida Response to EPA Comments, *supra* note 465, at 19-20.

(b) Does not contravene any permit term or condition for monitoring, testing, recordkeeping or reporting, or any compliance certification requirement;

(c) Does not require or change a case-by-case determination of an emission limitation or other standard, or a source- specific determination of ambient impacts, or a visibility or increment analysis under the provisions of Chapter 17-212 or 17-296, F.A.C.;

(d) Does not seek to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement and which the source has assumed to avoid an applicable requirement to which the source would otherwise be subject including any federally enforceable emissions cap or federally enforceable alternative emissions limit.

These criteria are the same as the first four gatekeepers for minor permit modifications in 40 C.F.R. section 70.7(e)(2)(i). The fifth criterion under Part 70, missing from Florida's rule, is that the change cannot be a Title I modification. EPA commented that Florida's "minor permit modification" (Immediate Implementation Pending Revision Process) procedures do not specify that they may not be used for modifications under any provision of Title I.[515]

In response, Florida is planning to make changes to the introductory portion of Rule 17-213.412, as shown:

> Those permitted Title V sources making any change that constitutes a modification pursuant to Rule 17-212.200, ~~17-213.400(2)~~ F.A.C., but which would not otherwise constitute a modification pursuant to Rule 17-213.100, F.A.C. ~~require preconstruction EPA review pursuant to 40 CFR 60.14, 40 CFR 61.15 or 40 CFR 52.21, all of which are incorporated by reference~~, may implement such change prior to final issuance of a permit revision in accordance with this section, provided the change:...[516]

Florida claims that the effect of the proposed change would be equivalent to the more general statement that Rule 17-231.412 procedures may not be used for Title I modifications.[517] And the addition of a prohibition against changes that would constitute a modification under Rule 17-213.100 would generally accomplish that purpose. As was seen in the above discussion

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[515] EPA Florida Program Review Comments, *supra* note 464, at 11.

[516] Proposed FLA. ADMIN. CODE ANN. Rule 17-213.412(1), from Florida DEP Workshop Draft, July 13, 1994.

[517] Florida Response to EPA Comments, *supra* note 465, at 18.

of "operating changes," Rule 17-213.100(22)'s definition of modification includes all Title I modifications.

However, Rule 17-213.100(22) also includes modifications under Rule 17-212.200.[518] And here, Florida has excepted out changes that constitute a modification under Rule 17-212.200. In fact, Florida's "Immediate Implementation Pending Review Process" is now expressly designed for changes that constitute a modification under Rule 17-212.200, or state minor NSR changes. Yet EPA has advised Florida that changes that trigger minor NSR will constitute Title I modifications that *cannot* be made by minor permit modification.[519] Thus, Florida's proposed amendment to Rule 17-213.412 may muddy the waters even more.

In addition, there are several problems with Florida's "Immediate Implementation Pending Revision Process" procedures. The procedures can be summarized as follows. Florida provides that a source may immediately implement the changes *after* they have been incorporated into the construction permit.[520] The source may conform its application for a construction permit to include all information that will be required for the Title V permit revision. The DEP must issue a draft permit revision or a determination to deny the revision within 60 days of receipt of the application, or, if a joint construction permit application was submitted, at the same time that the DEP acts on the construction permit. The DEP may not take final action until all the requirements of Rule 17-213.430(1)(a) (complete application), (c) (notification to affected states), (d) (notice to EPA, EPA 45 day review period, and EPA veto opportunity), and (e) (statement to EPA setting forth the basis for the draft permit conditions) have been complied with.

EPA found four problems with these procedures.[521] First, EPA did not believe the application requirements conformed to all the Part 70 requirements for minor permit

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[518] *See supra* text accompanying note 503.

[519] *See supra* text accompanying notes 506-07.

[520] FLA. ADMIN. CODE ANN. Rule 17-213.412(2).

[521] EPA Florida Program Review Comments, *supra* note 464, at 11-12.

modification applications.[522] In particular, the Florida rule does not require submission of the source's suggested draft permit. Second, EPA pointed out that there was no requirement to notify EPA and affected states within five working days of receipt of the application.[523] Third, EPA said that the program did not provide that final action be taken within 90 days of receipt of a minor permit modification or 15 days after the end of EPA's 45-day review period.[524] Fourth, EPA remarked that the rule did not specify that if the source fails to comply with the permit terms and conditions in the requested modification, the existing terms and conditions could be enforced against it.[525]

Florida offered the following explanations.[526] With regard to the application comment, Florida stated that Rule 17-213.412 was designed to meet the requirement for minor permit modifications under Part 70 without unnecessary delay in obtaining the air construction permit imposed by state rule. Since Florida determines the content of the draft Title V permit through issuance of an air construction permit which the Title V permit should mirror, there is no need for the applicant to include its suggested draft permit. With regard to the notification comment, Florida pointed out that subsection (2) of Rule 17-213.412 requires the applicant to provide copies of the application to the DEP, EPA, and affected states. Florida suggested this would be faster than the DEP providing the notice of the application to EPA and affected states.

With regard to the 90-day period for final action, Florida argued first that subsection (3) of the rule references Rule 17-213.430(1)(d), which in turn provides that permit revisions will not be issued until after EPA's 45-day review period. In addition, Florida explained that Rule 17-213.412(3) requires the DEP to take action on the Title V permit within 60 days, or

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[522] As required by 40 C.F.R. § 70.7(e)(2)(ii).

[523] As required by 40 C.F.R. § 70.7(e)(2)(iii).

[524] As required by 40 C.F.R. § 70.7(e)(2)(iv).

[525] As required by 40 C.F.R. § 70.7(e)(2)(v).

[526] Florida Response to EPA Comments, *supra* note 464, at 18-20.

at the same time it acts on the construction permit application. Since action on a construction permit is required within 90 days after application, there is a 90-day outer limit on the time for acting on the Title V permit, as required by Part 70.

Finally, Florida countered the comment about the absence of a provision holding the source liable for failure to comply with the permit terms and conditions in the requested modification. Florida stated that the purpose of subsection (5) of Rule 17-213.412, which states that the permit shield does not apply to changes covered by the rule until final action, is to make it clear that operation in compliance with the requested permit modification does not prevent enforcement for violation of applicable requirements.

Thus, it appears that Florida has demonstrated the adequacy of its procedures for its equivalent to minor permit modifications. The only significant question remains the Title I modification gatekeeper issue, an issue that has bedeviled other programs as well.

3. Summary

Florida's flexibility provisions are definitely unique, but also tangled. Florida's program is another example of problems that can arise when a state seeks to create a novel or innovative approach to Part 70. In response to EPA's comments, Florida has begun the process of making some necessary corrections. Although Florida may be given credit for its attempt to restate the essential elements of the Part 70 flexibility provisions, the resulting scheme seems even more difficult to follow than Part 70. It is hard to tell whether Florida provides any more flexibility to sources than Part 70; the impact of Florida's novel provisions is simply impossible to determine at this point.

E. Pennsylvania

Pennsylvania originally submitted its Title V program on November 15, 1993. However, EPA determined that it was incomplete. Not all Pennsylvania's Title V rules had been finalized at the time of submission. As of August 1,1994, Pennsylvania had not resubmitted its Title V program. The delay has been caused by the process of adopting revised rules, primarily covering the flexibility provisions. The final revised rules were released for public comment on May 21, 1994.[527] It is now anticipated that the rules will be adopted in late September 1994. Even though Pennsylvania's Title V program has not been submitted yet, its proposed rules[528] are very much worth studying from a flexibility perspective. Pennsylvania's progressive rules are unique among all state programs because they are generally consistent with EPA's proposed revisions to Part 70, rather than the current rule. Therefore, examination of Pennsylvania's proposed Title V program should provide an excellent foundation for understanding how states may approach the Part 70 flexibility provisions once they are revised.

Pennsylvania played an important role in persuading EPA to revise the Part 70 flexibility provisions. Pennsylvania was one of the 11 states participating in the permits litigation.[529] One of the motivations for Pennsylvania's involvement was the fact that the final Part 70 rule did not allow continuation of Pennsylvania's "sources of minor significance" program.[530] In addition, Pennsylvania challenged Part 70's minor permit modification procedures for failure to require public review.[531]

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[527] Advance Notice of Final Rulemaking, Air Quality Plan Approval and Operating Permit Program, May 21, 1994.

[528] To be codified at 25 PA. CODE Ch. 127, Construction, Modification, Reactivation, and Operation of Sources (see especially Subchapter D, Operating Permit Requirements).

[529] *See, e.g.*, Commonwealth of Pennsylvania v. J. Danforth Quayle, et al., D.C.Cir., No. 92-1426, consolidated in CAIP v. EPA, D.C.Cir., No. 92-1303 (1992).

[530] Advance Notice of Final Rulemaking, *supra* note 527, at 6.

[531] Pennsylvania v. Quayle, No. 92-1426, Petitioner's Non-Binding Statement of Issues, at 1-2. "Was the failure of the [EPA], at the behest of the White House Council on Competitiveness, to require in the final regulations public notification and an opportunity for

Pennsylvania originally released its proposed Title V rules in November, 1993.[532] They contained a number of variations on the Part 70 flexibility provisions that later were reflected, in whole or in part, in EPA's proposed revisions. In many respects, the flexibility provisions of Pennsylvania's draft program have served as a model for the permits litigation settlement negotiations and EPA's proposed revisions. For example, in November 1993, Pennsylvania's proposed section 127.462 required public notice and a 21-day period for public comment for "minor operating permit modifications."[533] Minor operating permit modifications were intended to incorporate the current Part 70's section 502(b)(10) changes and minor permit modifications, but obviously, the inclusion of a requirement for public notice and comment for minor change was more stringent than required by Part 70. At the time, Pennsylvania specifically solicited comment on whether its minor operating permit modification process would strike "the appropriate balance between providing an opportunity for public comment and allowing facilities to make minor changes without a complete permit review process."[534] EPA subsequently adopted Pennsylvania's approach, for the new category of minor permit revisions.

On March 21, 1994, when EPA released its outline of its proposal to revise the Part 70 flexibility provisions,[535] Pennsylvania was still reviewing comments on its November 1993 proposal and finalizing its rules. It was also aware of the progress of the settlement negotiations in the permits litigation. There was ample opportunity to incorporate certain elements of EPA's reproposal into the final rules. Pennsylvania claims that it has made those changes necessary to conform its flexibility provisions to EPA's March 21, 1994 proposal.[536]

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public comment in actions involving any applications for a minor permit modification arbitrary and capricious and/or beyond the requirements of the Clean Air Act?"

[532] 23 Pa. Bull. 5483 (Nov. 13, 1993).

[533] Proposed 25 PA. CODE § 127.462.

[534] 23 Pa. Bull. 5483, preamble, section K, question 3.

[535] *EPA Outline for a Proposal to Revise the Flexibility Provisions*, *supra* note 88.

[536] Advance Notice of Final Rulemaking, *supra* note 527, at 4, 6.

However, the July 8, 1994 proposed revisions released by EPA contains some differences from the March 21, 1994 outline. Thus, while Pennsylvania's rules are substantially consistent with EPA's proposed revisions, the ensuing discussion will reveal several discrepancies that may still require further rule changes on Pennsylvania's part (depending on the final form of EPA's proposed revisions).

It should also be pointed out that even though Pennsylvania contested the current Part 70, it still acted quickly to enact legislation to give its Department of Environmental Resources (DER) authority to implement Title V. The amendments to Pennsylvania's Air Pollution Control Act became effective on July 9, 1992.[537] The amendments included a straightforward authorization for operational flexibility in accordance with CAA section 502(b)(10).[538]

1. Consolidated Construction and Operating Permit Program

Pennsylvania describes its construction and operating permit system as an integrated program, but a better term would probably be a consolidated program. In order to understand Pennsylvania's air pollution control system, it is necessary to be familiar with the slightly awkward term "plan approval." This is Pennsylvania's phrase for the equivalent of a preconstruction review permit. The term "plan approval" is defined as:

> The written approval from the Department of Environmental Resources which authorizes a person to construct, assemble, install or modify any stationary air contamination source or install thereon any air pollution control equipment or device.[539]

Pennsylvania further provides that no person shall construct or modify any stationary source unless such person has applied to and received written plan approval.[540] Pennsylvania's plan approval program contains both nonattainment and PSD elements, as well as state minor NSR

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[537] The Air Pollution Control Act is found at PA. STAT. ANN. tit. 35, § 4001-4015 (1992). The amendments are found at Pub. L. 460, No. 95, § 7 (July 9, 1992). *See especially* PA. STAT. ANN § 4006.1, Plan approvals and permits.

[538] PA. STAT. ANN. tit. 35, § 4006.1(i).

[539] PA. STAT. ANN. tit. 35, § 4002 (definition).

[540] PA. STAT. ANN. tit. 35, § 4006.1(a); *see also* 25 PA. CODE § 127.11.

requirements.[541] However, there are exceptions from the requirement for a plan approval for "sources of minor significance," which are sources with de minimis emissions.[542]

Pennsylvania has required plan approvals for construction or modification since 1972.[543] Also, Pennsylvania has required state operating permits since 1972 for all sources receiving a plan approval to construct or modify.[544] When Title V was enacted, Pennsylvania determined that it would integrate its plan approval and operating permit program with the Title V program.

Pennsylvania describes its proposed integrated permitting approach as one designed to make the permitting process more efficient for its air agency, the regulated community and the public. "It will, in many cases, allow a source to complete and submit all the permitting documents relevant to its application and operation at one time, afford an opportunity for public input and provide for sequential issuance of the necessary permits."[545]

Under the Pennsylvania system, a new Title V facility seeking to construct an air contamination source would apply for a plan approval, a state operating permit and a Title V operating permit. The DER would then provide a single public notice of receipt of each of those applications and an opportunity for public comment and hearing. When appropriate, the DER would issue the plan approval authorizing construction of the facility and providing an opportunity for "shake-down" of the air pollution control equipment at the facility. After the source was constructed and the air pollution control equipment tested and operational, the DER would issue a joint state and Title V operating permit to the facility.[546]

This process would also be applicable to sources which have been operating lawfully

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[541] 25 PA. CODE ch. 127, subchs. A (general plan approval requirements), B (nonattainment), and C (PSD).

[542] 25 PA. CODE § 127.14.

[543] Pub. L. 989, No. 245, § 6 (1972).

[544] *Id.*; requirement codified at PA. STAT. ANN. tit. 35, § 4006.1(b)(1)

[545] 23 Pa. Bull. 5483, at section E (Summary and Purpose of the Proposed Amendments).

[546] *Id.*

without a permit (grandfathered sources). In that situation, a plan approval application would not be necessary. If the source was part of a Title V facility, the Title V facility would apply for a consolidated state operating permit and Title V operating permit. Upon receipt of the application, the Department would provide public notice and an opportunity to comment on the application. At the conclusion of the public comment period, the Department would, if appropriate, issue a consolidated state and federal operating permit.[547] Finally, some sources may be required to obtain a state operating permit but not a Title V operating permit. In these cases, only the state plan approval and state operating permit program requirements would be applicable.[548]

To achieve the goal of an integrated program, Chapter 127 of the Pennsylvania Administrative Code was reorganized and rewritten. Subchapter A contains the requirements related to plan approval applications. Subchapter D contains the state operating permit program requirements. Subchapter E contains the additional requirements for sources subject to the Clean Air Act Title V operating permit program.[549] Some noteworthy changes have been made to the existing state operating permit program in Subchapter D. All operating permits must now be issued for a five-year term, similar to the Part 70 requirement. Opportunity for public comment must be provided on all operating permit applications, and public hearings are authorized in circumstances where they are appropriate. A compliance review must also be conducted as part of the operating permit process.[550]

Of particular interest, Subchapter D now incorporates provisions into the *state* operating program related to operational flexibility. For example, section 127.447 authorizes the DER to issue operating permits incorporating several alternate operating scenarios. Section 127.448 authorizes emissions trading within a facility where the facility has a federally

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[547] *Id.*

[548] *Id.*

[549] 25 PA. CODE ch. 127, subchs. A, D, E.

[550] 25 PA. CODE §§ 127.446, 127.402, 127.428, 127.412.

enforceable emissions cap on its emissions. And section 127.462 provides an expedited process for making minor modifications at a facility. For certain changes, absent a specific problem with the proposed minor modification, the facility is allowed to implement the modification within 21 days of requesting the change.

However, despite the steps taken to consolidate aspects of construction and operation permitting, Pennsylvania's program is not the equivalent of an integrated program such as Louisiana's.[551] The simple reason is that Pennsylvania does not issue the Title V permit at the same time as the construction permit (plan approval). Rather than the Title V permit being issued jointly with the plan approval in advance of construction, Pennsylvania waits to issue the Title V permit until after shakedown. Thus, even though Pennsylvania's program may reduce some duplication, it is not truly an integrated program as envisioned by Part 70.

2. Operational Flexibility

As some other states have done, Pennsylvania's statute requires operational flexibility by essentially repeating the gist of CAA section 502(b)(10).[552] Operational flexibility is then implemented through several different provisions in the rules.

Pennsylvania summarizes its various operational flexibility provisions in one rule section. That section merges operational flexibility and permit revision concepts. In its entirety, it provides:

> Sec. 127.2. Operational Flexibility.
>
> (a) The following regulations implement the provisions of Section 502(b)(10) of the Clean Air Act and Section 6.1(i) of the Act [Pennsylvania's Air Pollution Control Act] related to operational flexibility.

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[551] *See supra* text accompanying notes 302-20.

[552] PA. STAT. ANN. tit. 35, § 4006.1(i) [§ 6.1(i) of the Air Pollution Control Act]. "The board shall by regulation establish provisions to allow changes within a permitted facility or one operating pursuant to clause (3) of subsection (b) of section 6.1 without requiring a permit revision, if the changes are not modifications under any provision of 42 U.S.C. Ch. 85 Subch. I (relating to programs and activities) and the changes do not exceed the emissions allowable under the permit whether expressed therein as a rate of emissions or in terms of total emissions, provided that the facility provides the administrator and the department with written notification at least seven (7) days in advance of the proposed changes, unless the board provides in its regulations a different time frame for emergencies."

(1) Section 127.448 authorizes emissions trading within a facility where there is a federally enforceable emissions cap on emissions of air contaminants.

(2) Section 127.449 authorizes de minimis emissions increases without a permit amendment and continues the Department's existing program for sources of minor significance contained in Section 127.14.

(b) The following regulations contain additional provisions that provide operational flexibility:

(1) Section 127.447 authorizes permittees to describe alternate operating scenarios in their permit application and allows the Department to issue operating permit [sic] incorporating several alternate operating scenarios.

(2) Section 127.462 provides for an expedited process for making minor permit modifications.

(3) Section 127.451 allows the administrative amendment procedures to be used for Title V operating permit amendments which have received state plan approval.[553]

3. Alternative Operating Scenarios

Pennsylvania's alternative scenarios provision generally mirrors current Part 70, but does not include the refinement under EPA's proposed revisions for notice to the permitting authority under certain circumstances. The EPA proposal changes the current rule by restricting recordation of scenarios being used in a log to those cases where monitoring meets certain requirements that will prevent tampering with the data. Otherwise, the permit must require that the source mail notice of any changes between scenarios to the permitting authority on a weekly basis.[554] Pennsylvania's rule does not contain this requirement for notice to the permitting authority. It simply provides that the source shall record the scenario under which it is operating in a log at all times, and the permit terms *may* require the source to notify the DER at the time it implements the change (it does not specify how).[555] This discrepancy may require Pennsylvania to make further changes.

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[553] 25 PA. CODE § 127.2.

[554] Proposed Amended 40 C.F.R. § 70.6(a)(9)(i).

[555] 25 PA. CODE § 127.447(b)(1).

4. Emissions Trading

Pennsylvania's section 127.448 authorizes both forms of emissions trading allowed under current 40 C.F.R. section 70.4(b)(12) - the optional trading under a SIP and the mandatory trading solely for the purpose of complying with a federally enforceable cap established in the permit. Although EPA's proposed revisions contain slightly different language than the current rule, it does not appear that any variations would pose any problem for Pennsylvania's rule.

5. De Minimis Emission Increases

In its proposed rules, Pennsylvania's provision for de minimis emission increases was found at section 127.513, which was part of Subchapter E, Title V Operating Permits. However, in the final rule, section 127.513 will be changed to section 127.449, where it will apply to *all* operating permits. This will allow the "sources of minor significance" program to continue to be applicable to both Title V and state-only sources.[556]

Pennsylvania conforms to EPA's proposed revisions by eliminating section 502(b)(10) changes and adding the provision for de minimis increases. Section 127.449 will allow de minimis emission increases at a permitted facility without a permit revision when the source provides seven days advance notice of the change. In conformity with the proposed revisions, Pennsylvania requires that the permit contain a condition authorizing the use of de minimis emission increases. Pennsylvania's rule does not have all the gatekeepers found in EPA's proposed revisions, however.

Pennsylvania's gatekeepers are that a de minimis increase cannot occur if it would increase the emissions of a hazardous air pollutant under CAA section 112, subject the source to nonattainment or PSD permit requirements, or violate an applicable requirement.[557] The prohibition against violating an applicable requirement is found in EPA's proposed revisions, and of course is common to all the flexibility provisions, both under the current Part 70 and

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[556] Advance Notice of Final Rulemaking, *supra* note 527, at 7.

[557] 25 PA. CODE § 127.449(b).

the proposed revisions. But the prohibition against an increase that would trigger major NSR permitting is not found in EPA's proposed revisions; it would not appear to be necessary considering the substantive limits on de minimis increases. The prohibition against any increase in hazardous air pollutants is one of the alternatives proposed by EPA.[558]

Certain gatekeepers required by EPA are not specified in the Pennsylvania rule. For instance, Pennsylvania does not provide that a source must be in compliance with the permit terms it seeks to change, that the need for the permit revision must result from a physical or operational change (unless the permit revision solely involves monitoring or recordkeeping requirements), that the change may not involve a permit term or condition established to limit emissions which is federally enforceable only as a Part 70 permit term or condition, that de minimis emission threshold levels cannot be met by offsetting emission increases with decreases at the same source, and that the change may not involve a change to monitoring or recordkeeping requirements unless the source demonstrates that the change will not affect its capability to measure emissions as accurately as before the change.[559] It appears these gatekeepers were added to EPA's proposed revisions after Pennsylvania issued its proposed rule, and will have to be added to Pennsylvania's rule.

Pennsylvania has chosen to define de minimis emissions increases in terms of tons per permit term, which is one of the alternative approaches proposed by EPA for both unit-based and increment-based de minimis.[560] For each criteria pollutant, Pennsylvania provides the limitation for a single source during the permit term and for the facility during the permit term. In each case, the limitation for the facility as a whole is five times the limitation for a single source. For example, the maximum increase for carbon monoxide is four tons from a single source during the term of the permit and 20 tons from the facility during the term of

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[558] Proposed Amended 40 C.F.R. § 70.7(f)(2)(ii)(B) proposes that one of the alternatives for increases of hazardous air pollutants (HAPs) allowed be zero tons per year, effectively preventing de minimis emission increases from being used for HAP emissions. Pennsylvania plans to adopt this approach for HAPs.

[559] Proposed Amended 40 C.F.R. § 70.7(f)(2)(i)(A)-(E).

[560] *See supra* text accompanying notes 239-40.

the permit.[561] It is not entirely clear whether the term "source" as used in Pennsylvania is equivalent to "unit" (emissions unit), as used in the EPA version. From Pennsylvania's definition of "Title V facility" it would appear that a source would be a grouping of emission units.[562] In that case, Pennsylvania's rule could be stricter than EPA's in that regardless of how many emission units there are in a source, the limitation would apply to the source as a whole.

There are key procedural differences between the Pennsylvania and EPA proposed rules. Pennsylvania does not treat de minimis emission increases as a permit revision.[563] Pennsylvania's advance notice of final rulemaking specifically states that de minimis increases can be made without a permit revision.[564] In this regard, Pennsylvania is following the mandate of its operational flexibility statute section. But the statute would conflict with EPA's proposed revisions. Pennsylvania also does not require monthly, batched public notice or allow public objection (or permitting authority disapproval or EPA veto as a result of public objection) after the change is made, as do EPA's proposed revisions.[565] In fact, Pennsylvania simply does not impose the full panoply of procedures required by EPA's proposed revisions. If Part 70 is revised to require a permit revision and post hoc public comment and objection for de minimis increases, then Pennsylvania will have to change its rule to conform.[566]

As noted earlier, part of Pennsylvania's rationale for authorizing de minimis increases was to continue its successful plan approval exemption program at section 127.14, which

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[561] 25 PA. CODE § 127.449(d)(i).

[562] 25 PA. CODE § 121.1.

[563] 25 PA. CODE § 127.2(a)(2).

[564] *See* Advance Notice of Final Rulemaking, *supra* note 527, at 6-7.

[565] Proposed Amended 40 C.F.R. § 70.7(f)(3).

[566] Pennsylvania does state that its minor operating permit modification procedure can be used to incorporate the authorization for de minimis increases into the permit terms and conditions, but this is not the same as a permit revision each time a change is made under the de minimis increase provision. Advance Notice of Final Rulemaking, *supra* note 527, at 7.

allows facilities to construct and operate "sources of minor significance" without requiring a plan approval.[567] Pennsylvania believes this program has been effective for avoiding delays and paperwork for sources with de minimis emissions. Pennsylvania concluded that Part 70 would not have authorized the continuation of such a program, because section 502(b)(10) changes cannot increase emissions allowable under the permit. Section 127.14 will provide that at a Title V facility, when the DER allows de minimis emission increases under section 127.449, plan approval will not be required.

6. Minor Operating Permit Modifications

Section 127.462, minor operating permit modifications, is Pennsylvania's equivalent to EPA's proposed *minor permit revisions* provision (which replaces the current minor permit modification process). Like the de minimis increases provision, Pennsylvania has made section 127.462 applicable to all operating permits, not just Title V permits.

Pennsylvania actually defines minor operating permit modifications separately, in section 121.1. The definition is as follows:

> Minor *operating permit modification*--A change to incorporate de minimis conditions or applicable requirements into an existing permit or a change that does not require plan approval but which contravenes an express permit term. The term does not include the following:
>
> > (i) A change that would violate applicable requirements or contravene enforceable permit terms and conditions that are monitoring (including test methods), *recordkeeping, reporting* or compliance certification requirements.
> >
> > (ii) A change that is a modification under Title I of the Clean Air Act.
> >
> > (iii) A change subject to Title IV of the Clean Air Act.
> >
> > (iv) A change that exceeds the emissions allowable under the permit, whether expressed as a rate of emissions or in terms of total emissions.
> >
> > (v) A change otherwise requiring approval on a case-by-case basis under this article or the applicable State Implementation Plan.

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[567] 25 PA. CODE § 127.14 exempts sources making changes such as installing low capacity combustion units, air ventilation systems, etc.

These criteria differ from some of the criteria in the EPA proposal. The possibly problematic prohibitions included by Pennsylvania are the ones against changes that exceed the emissions allowable under the permit (a section 502(b)(10) requirement) and changes that require case-by-case approval. For example, minor permit modifications as currently written do not allow changes which require approval on a case-by-case basis.[568] But this prohibition has been eliminated from EPA's proposed minor permit revisions provision.

The continuing restriction against changes which constitute a Title I modification may also be a problem, if Title I modification is redefined to include minor NSR, as discussed previously.[569] EPA's proposed revisions contain the gatekeeper that a minor permit revision may be used only for changes that "[a]re not modifications subject to parts C or D of title I of the Act, unless the change has been approved pursuant to major NSR and would incorporate all applicable requirements...."[570] As can be seen, this gatekeeper does not use the term "Title I modification," as does the equivalent gatekeeper in the current rule.[571] The obvious reason is that EPA here intends to refer only to major NSR. Minor NSR changes will be allowed under the minor permit revision procedures in EPA's proposed revisions. That is one the main ways in which what are now minor permit modifications will be broadened to provide more flexibility (of course, the trade-off is the addition of public review). Pennsylvania will have to ensure that its definition of Title I modification conforms to the proposed revisions. If it does, then Pennsylvania will have to change this aspect of its rule to clarify that minor operating permit modifications are prohibited only where the change involves major NSR.

In addition, there are some new criteria in EPA's proposed revisions which Pennsylvania does not have. For example, EPA's proposal does not allow changes which

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[568] 40 C.F.R. § 70.7(e)(2)(i)(A)(3). *See also* the discussion of Texas' problem in changing this criterion, *supra* text accompanying notes 348-54.

[569] *See supra* text accompanying notes 243-77.

[570] Proposed Amended 40 C.F.R. § 70.7(g)(1)(i)(E).

[571] 40 C.F.R. § 70.7(e)(2)(i)(A)(5).

"involve offsets or modifications under section 112(g) of the Act, unless the change has been approved pursuant to a section 112(g) review process."[572] Pennsylvania simply does not address this provision. It does not appear that Pennsylvania's prohibition against changes that constitute Title I modifications would suffice to cover this omitted criterion. It is likely that Pennsylvania will have to take further steps to reconcile its minor operating permit modification criteria with EPA's proposal.

It does appear that Pennsylvania's minor operating permit modification procedure generally conforms to the EPA proposal, but again there are some differences. Pennsylvania does require public notice to be published in a newspaper of general circulation and a 21-day public comment period. It then provides that the source may make the change subject to subsequent review and final action by the DER and EPA unless there is a germane and nonfrivolous public comment. In that case, the DER must decide by day 28 whether the comment is germane and nonfrivolous, and whether it warrants denying the change or requiring processing as a plan approval or significant modification.[573] These requirements are consistent with EPA's proposed revisions.

However, Pennsylvania's rule allows the DER 90 days to take final action, whereas EPA has shortened the period to 60 days, or 15 days after EPA's 45-day review, whichever is later (EPA's 45-day review could begin later than day one, depending on when it receives a copy of the application). In addition, Pennsylvania has not provided that any person who files a public objection which the permitting authority within 28 days of public notification does not determine to be germane and non-frivolous may bring suit in state court to compel action by the permitting authority and seek an injunction prohibiting the source from

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[572] Any person who filed a public objection pursuant to this paragraph which the permitting authority within 28 days of public notification does not determine to be germane and non-frivolous may bring suit in State court to compel action by the permitting authority and, in accordance with applicable standards for obtaining such relief under State law, seek an injunction in State court prohibiting the source from implementing the requested change.

[573] 25 PA. CODE § 127.462(c)-(f).

implementing the requested change.[574] There are other differences, mainly in that the EPA proposed revisions are more detailed concerning the process to be followed. While all the details of the process may not be completely necessary, Pennsylvania may want to add them at the same time that it corrects the more substantive discrepancies.

7. Administrative Operating Permit Amendments

The final aspect of Pennsylvania's rules to discuss is administrative amendments.[575] Pennsylvania allows the basic minor changes authorized under the current and proposed Part 70. It does not have a category for similar changes. Pennsylvania provides that administrative amendments can be used to incorporate into the Title V permit the requirements from plan approvals authorized under an EPA-approved program that meets procedural requirements equivalent to "this chapter" that would be applicable to the change if it were subject to review as a permit modification. Pennsylvania asserts that it is retaining the applicability of administrative amendments for those changes which have received state plan approval from the DER. Pennsylvania says that this process will only be allowed when EPA completes the rulemaking to revise the Title V regulations because, under the current Part 70, administrative amendments are not allowed for changes that require state plan approval authorization.[576]

However, Pennsylvania's position is somewhat difficult to follow. Part 70 does allow incorporation of construction permit terms that have been established through an "enhanced" Title V / NSR program. Apparently, neither Pennsylvania's current or proposed plan approval process contains all the procedural elements that would qualify it as an enhanced program. Although public notice and comment is part of the plan approval process, EPA veto and affected state notice is not.[577] Thus, under the current Part 70, it is not EPA that needs to

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[574] Proposed Amended 40 C.F.R. § 70.7(g)(5)(iii).

[575] 25 PA. CODE § 127.541.

[576] Advance Notice of Final Rulemaking, *supra* note 527, at 7.

[577] 25 PA. CODE §§ 127.41 - 127.51 allow for public notice, comment and a hearing for plan approvals, but provide no additional process.

revise the Title V regulations, but Pennsylvania that needs to create an enhanced program if it wants to incorporate NSR changes as administrative amendments.[578]

In summary, Pennsylvania has a very different program from the other states. While some of Pennsylvania's rules as originally proposed served as a model for EPA's proposal to revise the Part 70 flexibility provisions, and Pennsylvania was aware of EPA's intentions with regard to the proposal as of March 21, 1994, when it was preparing its final rules, its rules are not entirely consistent with what EPA ultimately released on July 8, 1994. Pennsylvania will probably still need to make some further changes when the EPA reproposal is finalized.

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[578] Note that in the proposed revisions, EPA uses the term "merged program" instead of "enhanced program." The primary difference is that in a merged program, EPA's opportunity to object to the change would not need to be provided prior to construction or modification of the source. *See* Advance Text, *supra* note 12, at 49 (preamble, sec. III.E.3.b); Proposed Amended 40 C.F.R. § 70.7(e)(4)(ii).

VII. CONCLUSION

The permits litigation and EPA's proposed revisions to the current Part 70 flexibility provisions confirm that the Title V program is still in its infancy. It will take more time to sort out the controversial flexibility provisions. This aspect of the Title V program may very well remain susceptible to political pressure.

Despite the likelihood of further changes to Part 70, however, most states have developed and submitted their Title V programs as required, and EPA is likely to act on many of them by November 15, 1994, or soon thereafter, under the current rule. Those programs will be in effect for some uncertain length of time, possibly until 1996 or 1997, and there may be an opportunity to see how some of the current flexibility provisions work in practice. As this paper has shown, where there are discrepancies in certain state flexibility provisions, EPA's best choice is to grant states interim approval, and impose requirements to revise their flexibility provisions as necessary to ensure consistency with Part 70.

The foregoing review of certain unique state Title V programs may tend to obscure the fact that most state programs track Part 70 very closely. Most states have not found it necessary to change the basic flexibility provisions, instead adopting them virtually "as is" from Part 70. In those states considered in this paper, it is very difficult to find any common approach to operational flexibility or permit revisions. Some states have taken the same approach to certain issues, such as requiring off-permit changes to be added to the state-only portion of the permit (Texas[579] and California's Ventura County). But others have prohibited or not fully addressed off-permit changes (Wisconsin, Florida). Texas and Florida seem to have truly struck out on their own, creating hard-to-understand or convoluted schemes in an already complex area. In doing so, they have generated some potentially significant problems, such as omitting some of the minor permit modification gatekeeper criteria.

Without any practical experience with the Part 70 flexibility provisions, it is difficult

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[579] Depending on whether Texas will use permit additions to add federally enforceable permit terms to the state-only portion of the permit. *See supra* text accompanying notes 343-45.

to evaluate both them, and their state counterparts. This review of selected state programs does not reveal any which can be considered a distinct improvement on the current Part 70 flexibility provisions, except for Pennsylvania, which is a special case in that it conforms more to EPA's proposed revisions than to the current rule. Texas' and Florida's programs seem to raise as many questions as they answer, and are not necessarily any easier to understand or apply than the Part 70 flexibility provisions.

It is also hard to measure the extent to which the various programs reviewed here may provide more or less flexibility than Part 70. It seems fairly clear that the Part 70 flexibility provisions themselves, especially the highly visible minor permit modification procedures, are quite narrow. Even EPA admits that in the preamble to its proposed revisions. Although one might have expected some states to seek to provide industry more flexibility than the Part 70 minimum floor, that does not seem to be the case. The chief reason may be that the various gatekeepers and restrictions EPA has imposed in Part 70 to implement the CAA's mandate to assure compliance with all applicable requirements create a straightjacket that prevents states from maneuvering to favor industry further. For instance, while Texas' omission of the complete case-by-case determination gatekeeper in its permit addition provision may give industry more room, it also violates Part 70 and will probably have to be changed.[580]

In addition, it is evident that providing industry the maximum amount of flexibility is not always a state's paramount goal. In many cases, the goals of preserving existing state operating or construction permit programs for effective air quality regulation and ensuring adequate review of operational changes have been more important. For instance, Texas has zealously guarded its existing minor NSR program, and Wisconsin has opted for more rather than less public and governmental review of minor permit modifications, as well as refusing to allow industry the potentially significant benefits of being able to make off-permit changes. None of this is surprising; state approaches reflect the conflict of the policies underlying Title V and Part 70.

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[580] *See supra* text accompanying notes 348-54.

What perhaps is the most instructive aspect of this review is the degree to which the states must walk a tightrope to negotiate the complex and heavily restricted Part 70 flexibility provisions. Some of those states which have chosen to deviate from the Part 70 flexibility provisions to create their own structure may encounter problems, and not all their flexibility provisions will survive EPA scrutiny. In the next few years, as the earliest permitted sources begin to make operational changes during the window before the proposed Part 70 revisions take effect, there may be a limited opportunity to see how states apply their current flexibility provisions. That practical experience may yield a better understanding of the meaning and impact of the state flexibility provisions studied in this paper. Of course, by then the Part 70 flexibility provisions will have reached the next stage of their evolution, and more attention will be focused on the revisions. Hopefully, any revisions to the current Part 70 flexibility provisions will constitute an improvement, even if they still do not satisfy all of the concerns of the regulated community, the environmental groups, and the regulators.